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RECORD, CASE NO. 15345.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1893.

TERM NO., 961.

ENOCH DAVIS, PLAINTIFF IN ERROR,

vs.

THE PEOPLE OF THE TERRITORY OF UTAH.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF UTAH.

FILED JULY 8, 1893.

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1 Territory of Utah, in the first judicial district court.

THE PEOPLE OF THE TERRITORY OF UTAH
against
ENOCH DAVIS.

The said Enoch Davis is accused by the grand jury of this court, by this indictment, of the crime of murder, committed as follows: The said Enoch Davis, on the sixth day of June, A. D. eighteen hundred and ninety-two, at the county of Uintah, in said Territory of Utah, in and upon one Louisa Davis, there being wilfully, feloniously, and of his deliberately premeditated malice aforethought, did make an assault with a certain revolver by him, the said Enoch Davis, then and there had and held, with which said revolver he, the said Enoch Davis, her, the said Louisa Davis, upon the head did then and there wilfully, feloniously, and of his deliberately premeditated malice aforethought beat, bruise, and wound, thereby then and there inflicting upon the head of her, the said Louisa Davis, one mortal wound, of which the said Louisa Davis then and there instantly died, and so the grand jurors aforesaid so say that in manner aforesaid, he, the said Enoch Davis, her, the said Louisa Davis, then and there did kill and murder, contrary to the form of the statutes of said Territory, in such cases made and provided, and against the peace and dignity of the people aforesaid.

G. W. MICKEL,
Foreman of Grand Jury.
CHARLES S. VARIAN,
U. S. Att'y.
By JOHN M. ZANE,
Asst. U. S. Att'y.

(Indorsed:) First district court. The People of the Territory of Utah vs. Enoch Davis. Indictment for murder. A true bill. G. W. Mickel, foreman of grand jury. Presented in open court, by the foreman of the grand jury, in the presence of the grand jury, and filed by me this 27th day of September, 1892. B. Bachman, jr., clerk. C. S. Varian, U. S. att'y., by John M. Zane, asst. U. S. att'y. Witnesses: Berlden Davis, William Davis, J. W. Collins, M. D., Nancy Haws, Ted Wilkins, May Davis (6 yrs. old), Mrs. Tribley, Theodore Davis, also all the Davis children older than May Davis.

2 In the di'trict court of the first judicial district.

TERRITORY OF UTAH,
County of Utah, *ss*:

THE PEOPLE OF THE TERRITORY OF UTAH
vs.
ENOCH DAVIS.
} Demur'er.

Comes now the defendant in the above-entitled cause and demurrers to the indictment heretofore filed herein on the grounds that said indictment does not state facts sufficient to constitute a public offence.

And on the further grounds that the names of the witnesses sworn before the grand jury, and who tistified in said cause, do not appear indorsed on said indictment as required by law.

WARNER & EDWARDS,
Att'ys for Defendant.

(Endorsed:) Title of court and cause. Filed September 29th, 1892. B. Bachman, jr., clerk. By L. Bachman, deputy clerk.

3 In the first judicial district court, Territory of Utah, county of Utah.

THE PEOPLE, ETC., *vs.* ENOCH DAVIS. } For murder.

Minutes of court.

Defendant herein having been duly arraigned at the bar in open court' and on the indictment being read to him, was given until September 29th to plead thereunto.

Dated September 28th, 1892.

JOHN W. BLACKBURN, *Judge.*

(Endorsed: Title of court and cause.)

The demurrer to the indictment having been duly argued by respective counsel, and the court now being fully advised therein, orders that the demurrer be overruled, to which order the defendant excepts. Now comes the defendant herein and to the indictment heretofore read to him pleads thereto "Not guilty." Case set for trial October 19th, 1892.

Dated September 29th, 1892.

JOHN W. BLACKBURN, *Judge.*

(Endorsed: Title of court and cause.)

In this case it is hereby ordered that Warner & Kenward and W. H. King be appointed as attorneys for said defendant, and a special venire issue for 20 jurers in this cause.

Dated October 20th, 1892.

JOHN W. BLACKBURN, *Judge.*

(Endorsed: Title of court and cause.)

Defendant being present in court and ready for trial, then came the following jury, to wit: Levi Openshaw, Newell Brown, Joshua Jones, Newell Knight, H. K. Ebert, R. A. Hills, jr., Thos. A. Southerland, John F. Westphal, Morgan Warner, James Whithead, S. M. Davis, and H. F. Cook, who, being legally empanelled and sworn, sat together, and the further hearing thereof was postponed till Monday morning.

Dated October 2d, 1892.

JOHN W. BLACKBURN, *Judge.*

4 (Title of court and cause.)

Defendant being present in court the further hearing of the case was proceeded and the jury after hearing tge evidence of the witnesses in part the further hearing thereof was posponet till to-morrow morning.

Dated Ootoder 24th, 1892.

JOHN W. BLACKBURN, *Judge.*

(Title of court and cause.)

Defendant being present in court the jury heretofore empanelled again sat togather and heard the balance of the testimony of the witnesses and the argument of the counsel in part, and the further hearing thereof wsa postponed untill to-morrow moening.

Dated October 25th, 1892.

JOHN W. BLACKBURN, *Judge.*

(Title of court and cause.)

In this case it is hereby ordered that the defendant's witnesses be paid by the Territory. Defendant being present in court the further hearing of this case was proceeded with, and the jury, after hearing the balance of the argument of the counsel and the instructions of the court, proceeded from the bar thereof in charge of a sworne officer and subsequently came into court and being polled returned the following verdict: "We, the jury empanelled in the above-entitled cause, find the defendant, Enoch Davis, guilty of murder in the first degree as charged in the indictment. Newell Brown, foreman." Sentence set for November 3d, 1892.

Dated October 26th, 1892.

JOHN W. BLACKBURN, *Judge.*

(Title of court and cause.)

The defendant being present in court, the motion for a new trial and in arrest of judgment having been separately argued by respective counsel, and the court now being fully advised therein, orders that said motions be overruled; to which order the defendant excepts. Defendant being present in court and being asked by the court if he had anything to say why sentence should not be now pronounced against him, and answering in the negative, and said defendant having chosen to be shot instead of hanging:

5 Thereupon the court rendered its judgment: Whereas you, the said Enoch Davis, having been duly convicted of the crime of murder in the first degree, without any recommendations whatever; it is therefore orrered, adjudged, and decreed that you, the said Enoch Davis, be taken hence to the penitentiary of the Territory of Utah, where you shall be safely kept untill Friday, December 30th, 1892, and that between the hours of ten in the fournoon and four in the afternoon on said day you *you* be taken from your place of confinement to the jail or jail yard of the county jail of the county of Utah, or some other private and convenient place in said county of Utah, and that you then be shot till you are dead. You are hereby remanded into the custody of the U. S. marshal of Utah, who will see that this judgment and sentence of the court are carried out and executed. To which orders defendant excepts.

Dated November 3d, 1892.

JOHN W. BLACKBURN, *Judge.*

And on the further grounds that the names of the witnesses sworn before the grand jury, and who tistified in said cause, do not appear indorsed on said indictment as required by law.

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Dated November 3d, 1892.

JOHN W. BLACKBURN, *Judge.*

6 In the district court of the first judicial district.

TERRITORY OF UTAH,
County of Utah, ss:

THE PEOPLE, ETC.,
vs.
ENOCH DAVIS. } Motion for new trial.

Now comes the defendant in the above-entitled cause, by his attorneys, Warner & Kenward, and moves the court to set aside the verdict and grant a new trial herein on the grounds following:

First. That the court misdirected the jury in matters of law during the trial of said cause, which appears from the record.

Second. That the court erred in his decisions upon material questions of law arising during the course of the trial, which appears from the record.

Third. That the verdict is contrary to the law and the evidence.

Fourth. That the said defendant has discovered new and material evidence for his defense which he could not with reasonable diligence have discovered and produced at the trial, as appears from the affidavits hereunto attached.

M. M. WARNER and
IRA W. KENWARD,
Attorneys for Defendant.

(Endorsed:) Title of court and cause. Filed November 3d, 1892. B. Bachman, jr., clerk, by L. Bachman, deputy clerk.

7 In the district court of the first judicial district.

TERRITORY OF UTAH,
County of Utah, ss:

THE PEOPLE, ETC.,
vs.
ENOCH DAVIS. } Motion in arrest of judgment.

And now, after verdict against the said defendant, Enoch Davis, and before sentence, comes the said Enoch Davis by his attorneys, M. M. Warner & Ira W. Kenward, and moves the court here to arrest judgment herein and not to pronounce the same, because of manifest error, the record appearing, to wit:

First. That the indictment herein does not charge "murder in the first degree."

Second. That the jury rendered a verdict against the defendant of "murder in the first degree," and in excess of that charged in the indictment.

M. M. WARNER and
IRA W. KENWARD,
Attorneys for Defendant.

(Endorsed:) Title of court and cause. Filed November 3d, 1893. B. Bachman, jr., clerk, by L. Bachman, deputy clerk.

8 In the district court of the first judicial district.

TERRITORY OF UTAH,
County of Utah, ss:

THE PEOPLE, ETC.,
vs.
ENOCH DAVIS. } Notice of appeal.

The defendant in the above-entitled cause, now under the sentence of death for the alleged crime of murder, by his attorneys and counselors at law M. M. Warner and Ira W. Kenward, hereby gives notice that he appeals to the supreme court of the Territory of Utah from the order of the trial court in overruling defendant's motion for a new trial, and from the order of the trial court in overruling defendant's motion in arrest of judgment, filed in this court prior to sentence, and from the judgment of the trial court in passing and imposing the death sentence on the defendant thereafter in said cause. All of which appears of record therein.

To the people of the Territory of Utah, and to Charles S. Varian, U. S. attorney, and to John M. Zane, ass't U. S. at'orney.

Dated this 3d day of November, A. D. 1892.

M. M. WARNER and
IRA W. KENWARD,
Attorneys for Defendant.

(Endorsed:) Title of court and case. Filed November 3d, 1892. B. Bachman, clerk. Due and legal service of the within notice of appeal accepted, and copy received this third day of November, A. D. 1892, at Provo, Utah. John M. Zane, asst. U. S. attorney.

8½ TERRITORY OF UTAH,
County of Utah, ss:

I, B. Bachman, jr., clerk of the district court of the first judicial district of the Territory of Utah, do hereby certify that the foregoing *is a* full and true and correct copies of the original files, orders, and minutes of the court as appears therein now on file and of record in my office, at Provo City, Utah.

Witness my hand and seal of said court, at Provo City, Utah, this 11th day of December, A. D. 1892.

[SEAL.] B. BACHMAN, Jr., *Clerk.*

9 In the supreme court, Territory of Utah.

TUESDAY, *March 14th*, 1893.

Regular January term.

THE PEOPLE, ETC.,
vs.
ENOCH DAVIS, APPELLANT. } Appeal from 1st district. J. W. Blackburn, judge.

This cause coming on regularly for hearing was argued by M. M. Warner, esq., in behalf of appellant, by Hon. Chas. S. Varian and John M. Zane in reply, was submitted and taken under advisement.

Blackburn & Miner, JJ., did not sit in this hearing.

Regular January term.

MONDAY, *March 27th, A. D.* 1893.

THE PEOPLE, ETC.,
vs.
ENOCH DAVIS, APPELLANT. } Appeal from 1st district.

This cause coming on regularly to be heard, a resubmission having been heretofore ordered by this court, was argued by M. M. Warner, esq., in behalf of appellant, by John M. Zane, esq., in reply, was submitted and taken under advisement.

Blackburn, J., did not sit in this hearing.

10 Regular January term.

WEDNESDAY, *March* 29, *A. D.* 1893.

THE PEOPLE, ETC.,
vs.
ENOCH DAVIS, APPELLANT. } Appeal from 1st district.

This cause having been heretofore argued and submitted and the court being sufficiently advised thereon, it is now here considered, ordered, and adjudged (Miner, J., dissenting) that the judgment of the district court therein be, and the same is hereby, affirmed, and this cause is remanded for further proceedings in accordance with law.

Bartch, J., delivered the opinion of the court, Zane, C. J., concurring.

Regular January term.

SATURDAY, *April 15th, A. D.* 1893.

THE PEOPLE, ETC.,
vs.
ENOCH DAVIS, APPELLANT. } Appeal from 1st district.

In this cause counsel for appellant having filed in this court his petition for writ of error removing this cause to the Supreme Court of the United States, it is ordered that said writ be, and is hereby, allowed.

11 In the supreme court of Utah Territory.

THE PEOPLE OF THE TERRITORY OF UTAH,
respondents,
vs.
ENOCH DAVIS, APPELLANT.

BARTCH, *J.:*

According to the record in this case the defendant was indicted on the 27th day of September, 1892, in the first judicial district, for the crime of murder. On the 29th of September, he, by his attorneys, demurred to

the indictment, which demurrer was overruled and the trial of the cause commenced on the 19th day of October. On the 26th of October the jury returned a verdict of guilty in the first degree, and on the 3rd day of November the court sentenced the defendant to be shot, he choosing that mode of death.

Before sentence was pronounced, counsel for defendant moved the court for a new trial, which motion was overruled, and thereupon counsel moved the court in arrest of judgment, alleging as a ground that the indictment does not charge murder in the first degree. The court overruled the motion and the defendant regularly appealed to this court, assigning as error the overruling of the several motions. No point appears to be made as to the regularity of the proceedings in the trial court, nor to the sufficiency of the evidence to sustain the verdict if the indictment be sufficient.

12 In the argument of the case before this court counsel confined themselves mainly to one point—the sufficiency of the indictment to charge murder in the first degree under our statutes, and the consideration of this point will dispose of all the assignments of error. The indictment reads as follows:

"The said Enoch Davis, on the 6th day of June, 1892, at the county of Uintah, in said Territory of Utah, in and upon one, Louisa Davis, there being wilfully, feloniously, and of his deliberately premeditated malice aforethought, did make an assault with a certain revolver, by him, the said Enoch Davis, then and there had and held, with which said revolver he, the said Enoch Davis, her, the said Louisa Davis, upon the head did, then and there wilfully, feloniously, and of his deliberately premeditated malice aforethought, beat, bruise, and wound, thereby then and there inflicting upon the head of her, the said Louisa Davis, one mortal wound of which the said Louisa Davis then and there instantly died; and so the grand jury aforesaid do say that, in manner aforesaid, he, the said Enoch Davis, her, the said Louisa Davis, then and there did kill and murder, contrary to the form of the statutes of said Territory in such case made and provided, and against the peace and dignity of the people aforesaid."

An indictment for murder in the first degree must contain all the facts necessary to constitute that crime in order to sustain a conviction in that degree. These facts must be precisely stated and with sufficient

13 certainty. It must furnish the defendant with such a description of the charge against him as will enable him to make his defense.

The crime of murder is made up of acts and intent, and these must be set forth with reasonable particularity, of time, place, and circumstance. (4 Bl. Com., 306; U. S. vs. Cruikshank, 92 U. S., 542.)

Does, then, the above indictment set out the acts and intent—the elements which constitute the crime of murder in the first degree—with sufficient certainty? Section 4452, C. L. Utah, provides that—"Murder is the unlawful killing of a human being, with malice aforethought," and section 4453 provides that "Such malice may be expressed or implied."

It is express when there is manifested a deliberate intention unlawfully to take away the life of a fellow creature.

It is implied when no considerable provocation appears, or when the circumstances attending the killing show an abandoned or malignant heart. The elements which constitute the crime of murder under our

Statutes are: First, that the being killed is a human being; second, that the killing was unlawful; and third, that the killing was done with malice aforethought.

All these elements seem to appear in the indictment in this case. When there is a deliberate intention to take away the life of a human being, malice is express; and when a human being is killed unlawfully without any considerable provocation, or when the circumstances at the time of
14 such killing show an abandoned or malignant heart, malice is implied.

The term malice denotes a wicked intention of the mind. An act done with a depraved mind, attendant with circumstances which indicate a wilful disregard of the rights or safety of others or of social duty, indicates malice. Malice aforethought is such wicked intention of the mind previously entertained. Such intention may be inferred from the acts. (1 Wharton Crim. Law, Sec. 117; Commonwealth v. York, 9 Met., 93.)

It was argued by counsel for defendant that as used in the indictment in this case the terms willfully, feloniously, and of his deliberately premeditated malice aforethought do not apply to the killing, but only to the assault; that the intent to kill is not manifest in the indictment, and that therefore the defendant was erroneously convicted of murder in the first degree. Section 4454, C. L. Utah, defines the degree into which murder is divided, and reads as follows:

"Every murder perpetrated by poison, lying in wait, or any other kind of wilful, deliberate, malicious, and premeditated killing; or committed in the perpetration of, or attempt to perpetrate, any arson, rape, burglary, or robbery, or perpetrated from a premeditated design, unlawfully and maliciously to effect the death of any other human being other than him who is killed; or perpetrated by any act greatly dangerous to the lives of others, and evidencing a depraved mind, regardless of human life, is murder in the first degree; and any other homicide committed under
15 such circumstances as would have constituted murder at common law is murder in the second degree." If a person forms a specific intent to unlawfully kill another, such killing is deliberate, premeditated, and malicious, and is murder in the first degree. This was also murder at common law, and in this respect the common law is not changed by a statute which simply carves out of the common law offense a lesser crime, that of murder in the second degree, which includes that class of murder under the common law wherein the specific intent, previously formed, to take life unlawfully is wanting. (1 Whart. Crim. Law, Sec. 393. Mitchell vs. The State, 16 Tenn., 514.)

Counsel for defendant insists that such specific intent is wanting in this case, and that the indictment will not sustain a verdict of murder in the first degree, but will at most only sustain a verdict of murder in the second degree, and that the allegations in the indictment necessary to constitute the crime of murder run only to the assault, and charge no specific intent to kill. If this contention be correct, then there is no ground on which the verdict can be sustained, even though it would reduce the grade of punishment of one who is actually guilty of the higher crime. The object of an indictment is to give the defendant precise information of the facts which constitute the criminal charge preferred against him.

In regard to the sufficiency of an indictment our Territorial
16 legislature has provided as follows: "All forms of pleading in criminal actions, and the rules by which the sufficiency of pleadings is to be determined, are those prescribed by this act." (C. L. Utah, sec. 4928.)

Section 4930 provides that "The indictment must contain," 2nd (omitting 1st subdivision), "a clear and concise statement of the acts or omissions constituting the offense, with such particulars of the time, place, person, and property as will enable the defendant to understand distinctly the character of the offense complained of and answer the indictment." And section 4938 provides that "The indictment is sufficient if it can be understood therefrom" (omitting all the subdivisions not material in this case); 6th, that the act or omission charged as the offense is clearly and distinctly set forth without repetition and in such a manner as to enable the court to understand what is intended, and to pronounce judgment upon a conviction according to the right of the case." These sections provide how the sufficiency of an indictment must be determined, what acts must be set forth, to what extent, and that they must be set forth clearly and distinctly, "without repetition," and in such manner "as will enable the defendant to understand the character of the offense" and the "court to understand what is intended."

The facts alleged in the indictment in this case, after stating the time when and the place where the acts were done, are that the defendant, with a revolver had and held, wilfully, feloniously, and of his deliber-
17 ately premeditated malice aforethought, made an assault upon the deceased, and did, with said revolver then and there wilfully, feloniously, and of his deliberately premeditated malice aforethought, beat, bruise, and wound the deceased upon the head, thereby inflicting one mortal wound, of which she then and there instantly died, and in that manner he did kill and murder the deceased.

Viewing these allegations in the light of the statutes above quoted, we think the acts of the defendant have been sufficiently described under the law.

The elements which constitute the crime of murder are stated with reasonable clearness and precision, and the indictment furnished such a description of the charge against the accused as was necessary to enable him to make his defense against the crime of murder in the first degree.

From the allegations the intent is manifest, and, if the facts alleged be true, it can not be successfully contended that the appellant merely intended a severe chastisement and did not intend to kill. The instrument used, the fierceness of the assault, the manner and place of the inflicting of the wounds, the instantly fatal result, all repel such a theory, and from the facts alleged one can not reasonably conceive of any other felony which he intended to perpetrate.

The allegations are sufficient to show that he intended the consequences of his acts. A person who uses a deadly weapon in an unlawful manner
18 must be taken to intend the natural and usual consequences resulting from such use. (Keenan vs. Com. Pa. St., 55; People vs. Halliday, 5 Utah, 471.)

Chief Justice Bigelow, in Commonwealth v. Hersey, 2 Allen, 173, after commenting on the authorities as to essential averments to the validity of an indictment, says:

"There can be no doubt that, in every case, to render a party responsible for a felony, a vicious will or wicked intent must concur with a wrongful act. But it does not follow that because a man can not commit a felony unless he has an evil or malicious mind or will it is necessary to aver the guilty intent as a substantive part of the crime in giving a technical description of it in the indictment.

On the contrary, as the law presumes that every man intends the natural and necessary consequences of his acts, it is sufficient to aver in apt and technical words that the defendant committed a criminal act, without alleging the specific intent with which it was done. In such case the act necessarily includes the intent."

The word intent is not used in the indictment in this case, but, as has already been observed, it is incorporated in the term "malice aforethought," and so also the acts described include the intent.

The words "and" and "then and there" are used in connection with each allegation, and the allegation "wilfully, feloniously, and of his deliberately premeditated malice aforethought" applied to the assault, as shown in the indictment, and to the beating, bruising, and wounding, ran
19 also, through the words "and" and "then and there" to the killing, and therefore it was not necessary to repeat the terms wilfully, feloniously, &c., in connection with the allegation did kill and murder. A further repetition would neither have rendered the charge more clear or certain, nor would it have brought the indictment nearer to the requirements of our statute. (State vs. Owen, 4 Am. D., 571. Bishop Crim. Pro., vol. 2, sec. 547 (3 ed.). People vs. Davis, 73 Cal., 355.)

Counsel for appellant placed much stress on the decision in State vs. Brown, 21 Kans., 38, and it appears to sustain their view of the case, but we do not think that decision is sustained by the weight of authority.

The facts concerning the unlawful acts of the defendant were set out with sufficient clearness and certainty in the indictment to give him precise information regarding the degree of the crime for which he w a required to answer, and there appears to be no good reason why the majesty of the law should not be vindicated.

The judgment of the court below is affirmed, and the case is remanded for further proceedings in accordance with law.

I concur.

ZANE, *C. J.*

I dissent.

MINER, *J.*

Marked: Filed Mar. 29, 1893. Jos. A. Bache, clerk.

20 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the supreme court of the Territory of Utah, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court before you, or some of you, between the People of the Territory of Utah, as plaintiffs and respondent,

and Enoch Davis, as defendant and appellant, a manifest error hath happened, to the great damage of the said Enoch Davis, as by his complaint appears. We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington within 60 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the honorable Melville W. Fuller, Chief Justice of the United States, the 23rd day of May, in the year of our Lord one thousand eight hundred and ninety-three.

[SEAL.] JOSEPH P. BACHE,
Clerk of the Supreme Court of the Territory of Utah.

20½ (Indorsed:) Supreme Court of the United States. Enoch Davis, pl'tff in error, vs. The People, etc., def't in error. Writ of error. Original. Filed in my office and a copy deposited with me this 23d day of May, 1893. Joseph P. Bache, clerk, supreme court of Utah Territory.

21 UNITED STATES OF AMERICA.

To the people of the Territory of Utah and to Hon. John W. Judd' United States attorney, greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States to be holden at Washington, in the District of Columbia, on the 23rd day of July, A. D. 1893, pursuant to the writ of error filed in the clerk's office of the supreme court of the Territory of Utah, at Salt Lake City, Utah, wherein Enoch Davis is plaintiff in error and you are defendant in error, to show cause, if any there be, why a judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the honorable Melville W. Fuller, Chief Justice of the said Supreme Court of the United States, this 23rd day of May, in the year of our Lord one thousand eight hundred and ninety-three.

C. S. ZANE,
Chief Justice Supreme Court of Utah.

Attest:
[SEAL.] JOSEPH P. BACHE,
Clerk Supreme Court of Utah.

Due service of a copy of the above citation acknowledged this 24 day of May, 1893.

J. W. JUDD,
U. S. Att'y.

21½ (Indorsed:) No. . In the Supreme Court of the United State'. Enoch Davis, pl'ff in error, v. People, etc., the def't in error. Citation. Original. Filed in the supreme court, May 23, 1893, at Salt Lake City Utah. Jos. P. Bache, clerk.

22 In the Supreme Court of the United States, on appeal from the supreme court of Utah.

TERRITORY OF UTAH,
County of Salt Lake, ss:

THE PEOPLE OF THE TERRITORY OF UTAH, plaintiff and respondent,
vs.
ENOCH DAVIS, DEFENDANT AND APPELLANT. } Assignment of error.

Now comes the defendant and appellant herein and assigns error herein, as follows:

The supreme court of the Territory of Utah erred in affirming the judgment of the trial court on the following points:

First. The court erred in overruling the defendant's demurrer to the indictment.

Second. The court erred in overruling defendant's motion for a new trial.

Third. The court erred in overruling defendant's motion in arrest of judgment.

Fourth. The court erred in failing to pass judgment on the defendant before sentence.

Fifth. The court erred in imposing and passing on the defendant the death sentence.

All of which appears of record in the transcript of record on appeal filed herein.

WARREN V. DUSENBERRY,
Attorney for the Defendant and Appellant.

22½ (Indorsed:) Supreme Court of the United States. The People of Utah Territory, respondent, vs. Enoch Davis, appellant. Assignment of errors. Filed in the supreme court May 23, 1893, at Salt Lake City, Utah. Jos. P. Bache, clerk.

23 UNITED STATES OF AMERICA,
Territory of Utah, ss:

In obedience to the command of the within writ I herewith transmit to the honorable Supreme Court of the United States a duly certified transcript of the record and proceedings in the within entitled case, together with all things concerning the same.

Witness my hand and seal of said supreme court at Salt Lake City, in said Territory, this 29th day of May, A. D. 1893.

[SEAL.]

JOSEPH P. BACHE,
Clerk Supreme Court of Utah.

(Indorsement on cover:) Supreme Court U. S., clerk's office. Received June 8, 1893. Case No. 15345. Term No., 961. Utah Territory supreme court. Enoch Davis, plaintiff in error, vs. The People of the Territory of Utah. Filed July 8th, 1893.

I am a resident of Keokuk, Iowa, and by profession a draughtsman, in which profession I have been engaged for 40 years. For the past 20 years or more, employed by the United States. In 1869 I was engaged by the Keoknk and Hamilton Bridge Co. to prepare maps, plans, &c., for the erection of a bridge across the Mississippi River at Keokuk, Iowa, by said Company. From the original surveys and soundings of the river at that point I prepared a profile of the bed of the Mississippi River, from which, on October 20th, 1893, I made a correct and true copy, which is attached to this affidavit, and marked "Exhibit D." The same is correct in every particular as herein stated and as noted on said profile.

[SEAL] O. S. WILLEY.

Subscribed and sworn to before me, this 31st day of October, 1893.

WILLIAM J. SCHLOTTER,
Notary Public.

IN THE SUPREME COURT OF THE UNITED STATES.

STATE OF IOWA, *Complainant*, *vs.* STATE OF ILLINOIS, *Defendant*. } No. 5 Original.

State of Iowa, } ss.
Lee County. }

I, John H. Cole, being first duly sworn, do depose and say, as follows:

I am a citizen of Keokuk, Iowa, a civil engineer by profession, and for the past twelve years have been the Superintendent of the Keokuk and Hamil-

ton Bridge Company, but have no pecuniary interest in said corporation whatever. I am familiar with all the litigation between said Company and the various municipalities of Illinois over the question of taxation, in which in a number of cases, Mr. A. W. Green has appeared as counsel for the City of Hamilton and Township of Montebello, being the township in Illinois in which the City of Hamilton is located, and being the same person now appearing as counsel for Illinois in this case, all of which culminated by agreement between both parties, and at the suggestion of the attorneys of Illinois in invoking the aid of the States of Iowa and Illinois to determine the question of the boundary lines, as under the constructions of the lower Courts, both States were claiming the same property for assessment.

On the appointment of the Commissioners to fix the line, the question arose as to who should pay the expense of said Commission, and it was found that there was no fund available for that purpose in either state, nor would there be until after the meeting of their respective Legislatures. As several suits between the parties particularly interested were waiting the determination of this question, and as a new assessment was very soon to be made in Illinois, the Keokuk and Hamilton Bridge Co., through me, agreed to pay all reasonable expenses of said Commission in fixing the line of their property, and accordingly, at the proper time, I paid said Commissioners the sum of one hundred and fifty dollars, being fifty dollars each for their services, and about fifteen dollars for map making, copying, etc. In paying this sum I fully expected to ask the states interested when their legislatures met, to reimburse said Bridge Company, and only did it to further the settlement

of other suits and avoid litigation over another assessment that might be made to the wrong point. I know Mr. J. L. Miller, whose affidavit is filed with the others by the State of Illinois, and who says he is one of the attorneys employed by the municipalities of Illinois in the litigation with the Bridge Company, and see said Miller crossing the Keokuk and Hamilton Bridge very frequently, and as the Commissioners mark upon said bridge is plainly indicated by two broad bands of different colored paints, and is and was of common notoriety, know that said Miller must have had knowledge of the point at which said line was fixed at or about the time said line was fixed, to-wit: March 23d, 1883. I am also acquainted with the Mess. Glazebrook and Blackmore who signed a joint affidavit as to their connection with making the profile prepared by Mr. McMath. Mr. Glazebrook is the ex-mayor of the city of Hamilton and the supervisor for the township of Montibello in which Hamilton is located, and Mr. Blackmore is the assessor for said township. Both of these men cross the bridge very often and must have had knowledge of the marking of the line on the bridge by the Commissioners very soon after it was done, and both of them know that the measurements or soundings taken at station 1400 upon said profile were taken on top of an old wooden pier placed in the river by the Bridge Company in 1881. There can be no doubt but what they knew the sounding taken at "Commissioners Mark" on said profile did not go to the bed of the river, as the rock thrown in to protect the pier at that point could be plainly seen at the time the soundings were taken. I have read all the affidavits filed by the State of Illinois on the motion of her Attorney General to set aside the

order confirming the report of commissioners to fix the boundary line between the States of Iowa and Illinois. H. S. Brown, one of the deponents, in that motion, says;

"That the deepest water was, at that time, at a point about 250 feet from the Iowa shore line." Having been for five years the city engineer of the City of Keokuk, I have had knowledge of all the maps, etc., of said city and a careful measurement 250 feet from the shore line as plainly shown upon the original map of Keokuk, towards the river brings you to a point about 50 feet west of the west abutment of the Keokuk & Hamilton Bridge and where there is no water at the present stage, to-wit; 1.4 feet above low water mark, which is a better stage than he says was in the river at the time he made his examination which he says was "during extreme low water." From soundings I have found that even another 250 feet further into the river will not find the deepest water.

I have also read the affidavit of Thomas B. McMath, and examined the profile prepared by him of the bed of the river and from soundings taken at station 1400 on said profile I know that they were taken from the top of an old pier that I put in to carry some wooden spans in the fall of 1881, as the bed of the river is at least 5 feet below the indicated bed upon that profile. At the point marked "Commissioners mark" the soundings do not go to the bed of the river but only to the sand and debris that has accumulated around the pier near there and where great quantities of rock were thrown in by me to save the pier from being pushed out by the ice, a slight movement from this cause having taken place. The original bed of the river here is at least 2.5 feet below the point indicated upon said pro-

file. From repeated examinations of profiles made of the bed of the river at this point by the United States Engineers, the city engineer of Keokuk in 1867, and the engineers of the Bridge Company, before locating the bridge, I believe the river bed between Keokuk, Iowa, and Hamilton, Illinois, to be practically one broad and comparatively level ledge of rock with here and there a hole or pocket worn deeper in some soft places in the rock, with no obstruction to navigation by any steamer, that is used in the commerce of said river at this point, and that the profile of said McMath does not correctly show the bed of the river in that it represents obstructions to the navigation of the river that are solely artificial, as I have found by repeated soundings reduced the low water mark of 1864. During my twelve year's experience as superintendent of this company with an office upon the west approach of the bridge, I have had opportunity to observe the course of a great many boats, as there have gone through the draw of said bridge as many as 3000 craft in one season, and I have never, even when the water was below the low water mark of 1864, which is the government base for reference, seen any kind of a craft strike or have any trouble in going over a point 400 feet east of the Iowa shore or 150 yards below said bridge.

I have seen a very great many times, steamers crossing and recrossing the river in all directions both above and below said bridge with tows of lumber, willows and the dump boats of the U. S. dredging fleet. In extreme low water it is of frequent occurrence that lumber is brought out of the Des Moines Rapids Canal and taken across the river and pushed up as far as possible under the east span of said bridge, and then for the boat to get in above the

bridge along the Illinois shore and pull the tow into the deep water from there Such an occurrence happened on the 23d and 24th day of October, 1893, with a stage of water 1.4 feet above low water. The pivot spans of said bridge were located at their present location by order from the United States Engineering Corps in order that boats could get in and out the Des Moines Rapids Canal, which terminates about 1000 feet above the bridge. Afterwards and before the canal was opened for business a channel was blasted out of the rock from below the west opening of the pivot span to the lower lock of said canal.

J. H. COLE.

Subscribed and sworn to before me this 30th day of October, 1893.

[SEAL.] WILLIAM J. SCHLOTTER,
Notary Public.

IN THE SUPREME COURT OF THE UNITED STATES.

STATE OF IOWA,
vs.
STATE OF ILLINOIS, } Original.

On motion of State of Illinois to vacate order approving report of commissioners.

State of Iilinois,
Hancock Connty. } ss.

George Edmunds, of Carthage, in said county, being duly sworn, says that he is nearly seventy-two years of age. That he has resided in Hancock and Adams counties, in Illinois over forty-eight years. That during the summer and part of the fall of 1845 he resided at Keokuk, Lee County, Iowa, and for five

years, next thereafter at Nauvoo, Hancock County, Ill. the next five years he resided at Quincy, Illinois, and since that continuously in Hancock County. That during all that time he has been engaged (among other things) in practicing law. That during the years 1846 and 1847 he, as a civil engineer, made a survey of the east side of the Mississippi River the whole length of the Des Moines Rapids of said river (said rapids extending from Nauvoo, Illinois to Hamilton, Illinois, and Keokuk, Iowa) with a view of presenting profiles to enable parties to raise money to construct a canal for hydraulic purposes, and at that time was very familliar with the depths of water on said rapids, as also between where Hamilton now is, and Keokuk, for half a mile or more below the lower chain of said rapids. That deponent believes said river, during the latter part of the summer and early fall of 1846, was as low if not lower than at any time since. That in 1845 and 1846 the original westerly SHORE of Islands Nos. 2 and 4 and of the towhead at the westerly end of Island No. 4, was substantially as indicated upon the plat attached hereto and marked "Exhibit A," where marked original shore line, and so remained until after the road, dam and dyke were built by the ferry company across Island No. 2, the slough between Islands No. 2 and 4 and the towhead and extending into the river about 300 feet: said dyke being marked on plat as dyke No. 1, and said road extending from the main shore in Illinois from what is now the west end of Main street, in Hamilton, to said dyke across said Island No. 2, dam and towhead. The west shore of said Island No. 2 being at this date substantially as it was in 1845 and 1846 above said dam. That the construction of said dam and dyke changed to a considerable extent the course

of the current in the easterly part of said river, and in the opinion of deponent caused deposits of sand below said dyke where before the bottom had been smooth rock, with occasional small depressions.

That in the opinion of deponent, before the construction of said dam and dyke any steam (or other) boat that could pass over said rapids at any stage, high, low or medium water, could as easily and safely pass over any part of said river between said Island and said Iowa shore, as it could pass over said rapids. That the distance from the lower chain of said rapids to said bridge, is about one half mile, may be something more.

That deponent was the attorney of said Ferry Company, and as such aided in securing license, charter, etc., for said company, and as engineer advised as to the locating of said road, dam and dyke, said road, dam and dyke being shown on said plat crossing said shore line. That said dyke extended northwest from the west shore of towhead at the northeast end of Island No 4, about 300 feet, and perhaps more; and its west and northwest front formed the ferry landing for a number of years, until about the time the railroad was located, when it was run from the main land to the then river, now east end of the approach of the Keokuk and Hamilton Bridge, when a road was constructed by the ferry company southwesterly along the river bank on Island No. 4, to where said plat shows a second dyke extending into the river some 700 feet from the then shore, and perhaps more; and which dyke is immediately north of said bridge approach. Said dyke was constructed by said Ferry Company. The construction of this dyke shortened the distance to ferry about one-quarter of a mile.

Deponent was one of the contractors for the delivery of stone for the basement of the State house at Springfield, and before the construction of said bridge, planned, and had constructed a track from the then Wabash depot at Hamilton, northwestward along said second dyke about half or two-thirds of its length, and there constructed derricks for the deliv- of stone from boats to cars, at which the great mass of the stone for the State house was transferred. The stone was principally brought on flat boats or barges towed by a steamboat to and from said place of unloading.

The deponent has been the attorney of the Keokuk and Hamilton Bridge Company in Illinois, ever since the construction of said bridge in 1871. That the authorities of Hamilton, Illinois, assumed, after the construction of said bridge, that the state line between Illinois and Iowa was at the east end of the draw of said bridge, 380 feet east of the west abutment of said bridge, and 580 feet east of the Iowa shore of the river, and 1812 feet west of the east abutment of said bridge, and over 2,500 feet west of the east shore of said river on said Island No. 4; and the Iowa authorities assumed the right to tax said bridge to its center, thereby making a double assessment of 716 feet of said bridge proper. Litigation was commenced in Illinois to get rid of that excess of taxation, some of which is yet pending.

Deponent on behalf of the Bridge Company applied to Attorney General Hunt to bring suit in this Court against the State of Iowa in the name of the State of Illinois. Mr. Hunt refused to bring the suit, but said if Iowa would bring the suit, he would appear and answer for Illinois. Thereupon, application was made to the Attorney General of Iowa and this

suit was brought; and in this cause Commissioners were appointed and made report as to the Keokuk and Hamilton Bridge, which was filed and motion made for confirmation by the State of Iowa, March 30, 1893. On Saturday 1st, or Monday 3d of April, 1893, deponent was at the Attorney General's office of Illinois at Springfield, and there informed either the Attorney General or his assistant that said report had been filed and motion for confirmation made, and as the time to make a new assessment was near at hand, requested that the matter be attended to at once. At that time deponent had no knowledge as to what that report contained; he only had learned the fact of filing report and motion by telegraph, without detail thereof.

Deponent further says that he did not employ James C. Davis as an attorney in this cause. That never, to deponent's knowledge, has he spoken to the said Davis on the subject of this suit until since this motion was made.

GEORGE EDMUNDS.

Subscribed and sworn to before me, October 28th, 1893. Witness my hand and official seal.

[SEAL] WILL C. NEWTON,
Notary Public.

IN THE SUPREME COURT OF THE UNITED STATES.

STATE OF IOWA, *Complainant,*
vs.
STATE OF ILLINOIS, *Defendant.* } Original.

On motion by the State of Illinois to vacate order approving report of Commissioners.

State and Southern District of Illinois ss.

and shows correctly a cross section of the Mississippi River at the Keokuk and Hamilton bridge from the east to the west abutment of said bridge, and the points at which the soundings were made; and the figures in red thereon show the depth of water at the points indicated. The point marked on said plat as "Commissioners mark" is the point at which the commissioners appointed in this suit to fix the boundary line between the states of Iowa and Illinois fixed such boundary line. In making such soundings I was assisted by William H. Glazebrooks and Mark Blackmore.

THOMAS B. MCMATH.

Subscribed and sworn to before me, this 20th day of September, A. D. 1893.

My term expires April 7, 1897.

JOS. A. WHERRY,

Notary Public, City of St. Louis, Missouri.

[SEAL.]

IN THE SUPREME COURT OF THE UNITED STATES.

The State of Iowa
vs.
The State of Illinois.

STATE OF ILLINOIS,
COUNTY OF HANCOCK. } ss.

We, William H. Glazebrook and Mark Blackmore, being severally duly sworn, do depose and say as follows:

On September 13, 1893, we assisted Thomas B. McMath in making soundings of the Mississippi river at the place where the Keokuk and Hamilton bridge crosses that river, in order to ascertain the depth of water therein; the statement contained in the preceding affidavit of Thomas B. McMath in regard to the manner of making such soundings is true, and the statements in said affidavit in regard to the plat annexed to his affidavit are also true.

WILLIAM H. GLAZEBROOK,
MARK BLACKMORE.

Subscribed and sworn to before me, this 22d day of September, A. D. 1893.

R. R. WALLACE.

[SEAL.] *Notary Public in and for County of Hancock. State of Illinois.*

IN THE SUPREME COURT OF THE UNITED STATES.

The State of Iowa
vs.
The State of Illinois.

STATE OF ILLINOIS,
COUNTY OF ADAMS. } ss.

I, H. S. Brown, being duly sworn, do depose and say that I have been engaged in river improvements since 1856; I have examined the bottom of the Mississipp River at the point now spanned by the Keokuk and Hamilton bridge from shore to shore, during extreme low water in the winter season when the almost entire bottom can be seen; that the deepest water was, at that time, at a point about two hundred and fifty feet from the Iowa shore line. Prior to the building of the Keokuk and Hamilton bridge, steamboats passed in or near said water; that portion of the river at said point near the Iowa shore is the only portion of said river which can be used by steamboats in passing up and down, when said river is at a low stage of water. The Hamilton slough was never, in my time, navigable for steamboats except in very high water, and was never used as a channel of the river.

H. S. Brown.

Subscribed and sworn to before me, this 19th day of September, A. D. 1893.

WM. G. FEIGENSPAN,
Notary Public, Adams County, State of Illinois.
[SEAL.]

IN THE SUPREME COURT OF THE UNITED STATES.

The State of Iowa,
vs.
The State of Illinois.

STATE OF IOWA,
COUNTY OF VAN BUREN. } ss.

I, Robert Farris, being duly sworn, do depose and say that I am a resident of Van Buren County, Iowa, and am sixty-six years of age; for thirty-seven years I was engaged in the business of a pilot on the Mississippi river, and was most of that time engaged in piloting steamboats over the Des Moines Rapids from Montrose, Iowa, to Keokuk, Iowa; during the time the Keokuk and Hamilton bridge was building, and for many years prior to that time, I was constantly engaged in piloting steamboats from Montrose to Keokuk, passing that part of the river now spanned by the Keokuk and Hamilton bridge almost daily during the boating season; I am familiar with the Mississippi river at this point, and have been for the past thirty-seven years, and before the Keokuk and Hamilton bridge was built, the navigable channel originally used, and along which vessels in the carrying trade passed, was near the Iowa shore; the west line of said channel was where the pivot pier of said bridge now stands, and the east line at a point not exceeding four hundred feet east of where said pivot pier now stands; the above described channel was the only channel in said river at this place where vessels engaged in the carrying trade could pass.

ROBT. FARRIS.

Subscribed and sworn to by Robert Farris, before me, this 20th day of September, A. D. 1893.

[SEAL.] W. D. MCCORMICK,
Notary Public in and for Van Buren County, Iowa.

IN THE SUPREME COURT OF THE UNITED STATES.

The State of Iowa
vs.
The State of Illinois.

STATE OF IOWA,
COUNTY OF LEE. } ss.

I, R. S. Owen, being duly sworn, do depose and say that I am a resident of Lee county, Iowa, and am sixty years of age; that for thirty-nine years I was engaged in the business of a pilot on the Mississippi River, and was most of that time engaged in piloting steamboats over the DesMoines Rapids, from Montrose, Iowa, to Keokuk, Iowa; during the time the Keokuk and Hamilton bridge was building, and for many years prior to that time, I was constantly engaged in piloting steamboats from Montrose to Keokuk, passing that part of the river now spanned by the Keokuk and Hamilton bridge constantly during the boating season; I am familiar with the Mississippi River at this point, and have been for the past thirty-nine years and before the Keokuk and Hamilton bridge was built, the navigable channel originally used and along which vessels in the carrying trade passed was near the Iowa shore; the west line of said channel was where the pivot pier of said bridge now stands, and the east line at a point not exceeding four hundred feet east of where said pivot pier now stands; the above described channel was the only channel in said river at this place where vessels engaged in the carrying trade could pass.

R. S. OWEN.

Subscribed and sworn to before me, this 19th day of September, A. D. 1893.

WASHINGTON GALLAND,
[SEAL.] *Notary Public for Lee County, Iowa.*

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Office Supreme Court U. S.
FILED.
NOV 21 1893
JAMES H. McKENNEY,
CLERK.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1893.

THE STATE OF IOWA
vs.
THE STATE OF ILLINOIS.

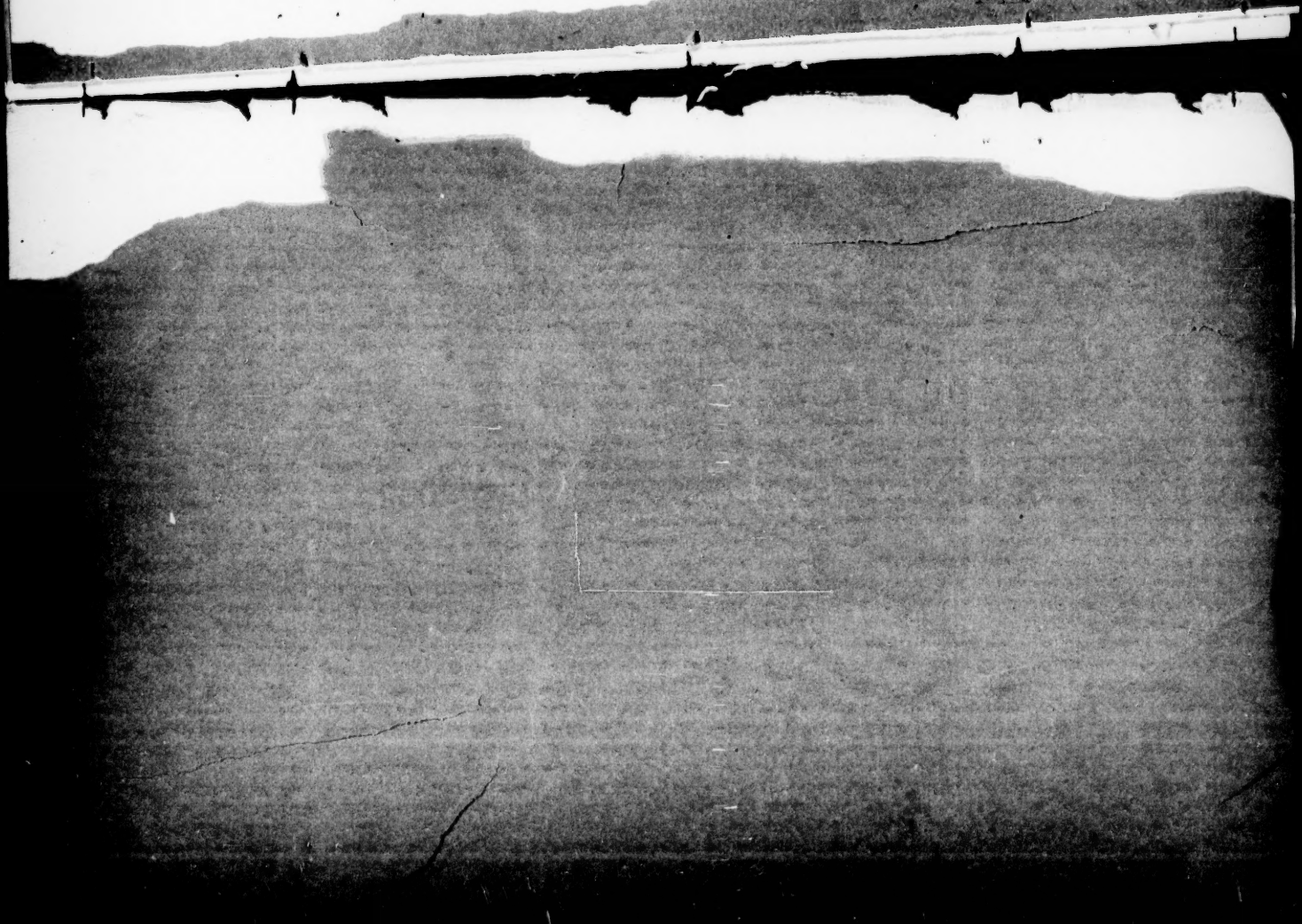
ORIGINAL SUIT
IN EQUITY.
No. 5.

REPLY OF THE STATE OF ILLINOIS ON MOTION TO SET ASIDE ORDER CONFIRMING COMMISSIONERS' REPORT.

M. T. MOLONEY,
ATTORNEY GENERAL OF THE STATE OF ILLINOIS.

A. W. GREEN,
HENRY S. ROBBINS,
OF COUNSEL.

BARNARD & GUNTHORP, PRINTERS, CHICAGO.



IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1893.

THE STATE OF IOWA vs. THE STATE OF ILLINOIS.	ORIGINAL SUIT IN EQUITY. No. 5.

REPLY OF THE STATE OF ILLINOIS ON MOTION TO SET ASIDE ORDER CONFIRMING COMMISSIONERS' REPORT.

I.

THE ORDER OF APRIL 10, 1893, CONFIRMING THE COMMISSIONERS' REPORT IS NOT A FINAL ORDER.

The order entered herein on the 10th day of April, 1893, confirmed the commissioners' report marking the boundary line between the States of Illinois and Iowa at the Keokuk and Hamilton Bridge, and ordered the commissioners to proceed to determine and mark the boundary line between said states throughout its extent, and report to this Court.

It is contended on behalf of the State of Iowa that this order is a final judgment, and that, therefore, this

Court has no power to change, alter or modify the same after the final adjournment of the Court at the term at which said judgment or decree was entered. Let us see if this position is correct. The object of this suit is to obtain a final decree from this Court locating the boundary line between the States of Illinois and Iowa. An interlocutory decree was entered on January 3, 1893, wherein it was ordered, adjudged and declared by this Court that the boundary line between the State of Iowa and the State of Illinois is the middle of the main navigable channel of the Mississippi River at the places where the nine bridges mentioned in the pleadings cross said river. And it was further ordered that a commission be appointed to ascertain and designate at such places the boundary line between the two states, such commission consisting of three competent persons to be named by the Court upon the suggestion of counsel and be required to make a proper examination and to delineate on maps prepared for that purpose the true line as determined by this Court and report the same to the Court for its further action.

On March 6, 1893, there was filed in this Court a joint request for the appointment of commissioners wherein the names of the commissioners were suggested and a request that the commissioners be directed at once to fix the boundary line on the Keokuk and Hamilton bridge, and an order was entered upon this joint request appointing the commissioners and ordering them to locate and mark the state line between the two states pursuant to the opinion of the Court at each of the nine bridges across the Mississippi River between these states, and in view of the emergency alleged to exist ordering the commissioners to proceed at once to ascertain and mark the

boundary line between the states at the Keokuk and Hamilton bridge, and to report at once their action in that regard before proceeding to ascertain the line or mark the same at the other bridges, and that afterwards they determine and mark the said state line at the other eight bridges when requested by either party, and report the same. The report of the commissioners marking the boundary line at the Keokuk and Hamilton bridge was filed on March 30, 1893, and a motion made by the State of Iowa for an order confirming the same. If a decree had been entered upon that report confirming it and also in terms fixing the boundary line between the two states where the Keokuk and Hamilton bridge crosses the river, there would at least have been some reason in claiming that such an order would have been in the nature of a final order. Such an order even if final, however, could have been set aside by this Court at a subsequent term, if its entry was procured by fraud or imposition.

This Court doubtless saw that if such an order were entered, it would lead to this result:—that as there were nine bridges there might be nine different decrees in this case. The Court therefore while confirming the report did not enter any decree which by its terms fixed the boundary line at this point, but directed the commissioners to proceed to determine and mark the boundary line between the states throughout its extent.

The order is as follows:

"SUPREME COURT OF THE UNITED STATES,

NO. 5, ORIGINAL, OCTOBER TERM, 1892.

The State of Iowa, Complainant,
vs.
The State of Illinois.

This cause coming on to be heard upon the application of the State of Iowa for an order confirming the report of the commissioners, presented herein, ascertaining and marking the boundary line between the State of Illinois and the State of Iowa, at the Keokuk and Hamilton Bridge, at Keokuk, Iowa, it is ordered that the said report be, and the same is hereby, confirmed; and it is further ordered that said commissioners proceed to determine and mark the boundary line between said states throughout its extent, and report thereon to this Court, with all convenient speed, and that the order herein entered on March 7, 1893, be, and it is hereby modified in accordance herewith.

April 10, 1893."

This order has none of the elements of a final decree. It does not purport to adjudge or decree where the boundary line is at the point where the Keokuk and Hamilton bridge crosses the river. It simply confirms the partial report made by the commissioners and directs them to proceed to complete their work.

The previous order required the commissioners to fix the boundary line at this particular point, and make their report, and then to wait before further proceeding until requested by either party. This order of April 10th. requires the commissioners to proceed to mark the boundary line throughout its extent in accordance with the prayer of the bill. It evidently contemplates that when the final report of the commissioners comes before the Court it will be considered, and if confirmed, then a de-

cree will be rendered which shall by its terms fix the boundary line between the states throughout its extent.

It is not the report of the commissioners which finally adjudges where the boundary line shall be. It is the decree of the Court which is to fix the boundary line, and wherein the boundary line must be definitely stated. A decree to be final must by its terms adjudicate the rights of the parties.

The case of *Central Trust Company* v. *Grant Locomotive Works*, 135 U. S., 207, is cited by counsel on this point. The orders held to be final orders in that case are found at pages 210, *et seq*. As said in the opinion of the Court, they were made upon matters distinct from the general subject of the litigation. They determined by their terms the ownership to certain locomotives and the right to their possession and completely adjudicated the rights of the parties to the subject-matter of the petitions upon which they were entered.

In *Fosdick* v. *Schall*, 99 U. S., 235, there was a decree upon an intervening petition. The decree in terms settled the rights of the parties.

In *Trustees* v. *Greenough*, 105 U. S, 527, there was a reference to a master upon a matter incidental to the cause, the inquiry being a collateral one. Evidence was taken before the master, and a report was made by the master. The final order confirmed the report in part and disallowed it in part, and the order itself fixed in terms the amount allowed. The court of course held that this was:

"A final determination of the particular matter arising upon the complainant's petition for allowances, and directs the payment of money out of the fund in the hands of the receiver. Though incidental to the cause, the inquiry was a collateral one, having a distinct and independent character, and received a final decision."

In *Williams* v. *Morgan*, 111 U. S., 684, there was a decree fixing the compensation to be paid to the trustees under the mortgage from the fund realized from the sale. This Court says (page 699):

"That the order was such as could be appealed from, we think is equally apparent. It was final in its nature and was made in a matter distinct from the general subject of litigation—a matter by itself, which affected only the parties to the particular controversy, and those whom they represented."

In each of those cases, the order under consideration differs from the order under consideration in this case in two particulars: 1st. Each relates to a matter distinct from the general subject of litigation. 2d. Each of the orders is complete in itself, and by its terms adjudicates the rights of the parties to the order, and is in form a final decree.

The order under consideration in this case relates to the general subject of the litigation, and does not purport finally to adjudicate on that subject. It does not purport to fix the boundary line at any point; it merely confirms a partial report of the commissioners and directs them to proceed to mark the boundary line through its extent. It has none of the elements of a final decree. We are willing to have this order tested by the definition of a final decree cited by counsel from the case of *Beebe* v. *Russell*, 19 How., 285.

"When a decree finally decides and disposes of the whole merits of the cause and reserves no further questions or directions for the future judgment of the court, so that it will not be necessary to bring the cause again before the court for its final decision, it is a final decree."

If this order had been entered in a circuit court, it seems to us quite clear that it would not have been ap-

pealable, because it was not a final order. In fact, if the order had simply confirmed the report of the commissioners, and had not gone on and directed the commissioners to proceed further, still it would not have been a final order any more than the confirmation of the report of a master in chancery upon a partnership accounting would be a final order. The Court must go on and by its decree determine the matter in controversy.

In *Kingsbury* v. *Kingsbury*, 20 Mich., 212, upon a bill for a partnership accounting, it was referred to a special commissioner to take an account, who made his report, to which exceptions were taken by the complainant. All of the exceptions were disallowed, and the report of the commissioner was confirmed. Thereupon the complainant appealed to the Supreme Court, and defendant moved to dismiss the appeal on the ground that the order confirming the commissioner's report was not a final decree or order. The court says (page 214):

"But a mere confirmation of the report is not a final decision of the cause. The case must, after such confirmation, be brought on to be heard, and upon the final hearing, if the facts are sufficiently presented to make a decree, the court will then proceed to adjudicate and direct what remedy is to be had against either party and give its decree in such a shape that it can be enforced. The present order contains no such feature. * * * A confirmed report at best stands in the same relation to decree as a verdict to a judgment. It may be almost certain that the decree will follow it, but it cannot be enforced until the decree is entered."

And the court held that the order in question, not being a final decree, was not appealable.

In *Adkisson* v. *Dent*, 88 Ky., 628, it was claimed that an order confirming the report of a commissioner after the term at which it was confirmed, was final. The

court held that it was not final, and might be disregarded by the court when it came to render final judgment, though at a subsequent term. The court says (page 630):

"The court, when there are no reasons shown to the contrary, may, in advance of the final judgment, confirm the report; but this is upon the idea that, as the parties interested have filed no exceptions suggesting inaccuracies, the report is probably correct. But the report possesses no elements of a judgment, and its confirmation does not impart to it the properties of a judgment."

We have been unable to find any case in this Court which upon its facts is like the case at bar, but we refer to the following cases wherein decrees were held not to be final decrees:

Rail Road Co. v. *Swasey*, 23 Wall., 405.
Parsons v. *Robinson*, 122 U. S., 112.
Burlington C. R. & N. Ry. Co. v. *Simmons*, 123 U. S., 52.

We respectfully submit that the order of April 10, 1893, which merely confirmed the partial report of the commissioners, and directed them to proceed to complete their work is not a final order, and that this Court has complete jurisdiction to alter, modify or set it aside as justice shall require.

II.

THE ORDER OF APRIL 10, 1893, WAS NOT ENTERED UPON NOTICE TO THE STATE OF ILLINOIS, NOR DID THE STATE OF ILLINOIS EVER CONSENT TO THE ENTRY THEREOF.

It is claimed that the order of April 10, 1893 was entered upon notice to and agreement by the State of Illinois. This claim is based upon the affidavit of Walter I.

Hayes filed on behalf of the State of Iowa. In that affidavit, Hayes says that he received a telegram from M. T. Maloney, Attorney General of the State of Illinois, which is as follows:

WESTERN UNION TELEGRAPH COMPANY.

* * * * *

Number 47 nv. Sent by tz. Recd. by Bn. 35 pd. Received at Corcoran Bldg., S. E. cor. 15th & F. Sts., Washington, D. C., Mar. 26, 1893, dated Springfield, Ill., 26.

To Walter I. Hays, Cr. J. H. Cole, Washn.

You are authorized to appear in Sup. court of U. S., in case of Iowa v. Illinois, and consent to the confirmation of the report of commissioner as to line at Keokuk and Hamilton Bridge.

M. T. MALONEY.

In the petition filed by the State of Illinois, which is signed by Attorney General Moloney of that State, it is alleged "that no notice was ever given to its Attorney General or in any way to the State of Illinois that the said commissioners had made their said report or that an application would be made to this court to confirm any report of said commissioners; that not until after the final adjournment of this court at its last term did the Attorney General of the State learn that a report had been made by the said commissioners, and that said report had been confirmed."

In view of this allegation it need hardly be said that the telegram attached to the affidavit of Hayes was a surprise to the counsel for the State of Illinois. An examination of the affidavit in connection with the record in this cause changed that surprise to suspicion.

The telegram is dated March 26, 1893, which was Sunday, and is sent to Hayes, care of J. H. Cole, Washington.

It is not explained how the Attorney General of Illinois came to send such a telegram. It is not claimed that it was sent in response to any communication from counsel for the State of Iowa, or from anybody else. It is not claimed that any notice was served upon the State of Illinois or its Attorney General, that the commissioners had made their report and that an application would be made to confirm such report, or that on the 26th of March, 1893, the Attorney General of Illinois knew anything about it. On these points the affidavits filed on behalf of the State of Iowa are absolutely silent. Yet the claim is made that on Sunday, March 26, 1893, the Attorney General of Illinois of his own motion telegraphed to Mr. Hayes to appear in this Court in this cause, and consent to the confirmation of the report of commissioners as to line at Keokuk and Hamilton bridge. What did Mr. Hayes do? From his affidavit, one would suppose that the record in this cause would show that he appeared on behalf of the State of Illinois and consented to the confirmation of this report, but he did not do so. On March 30, 1893, the record shows that on motion of Mr. Walter I. Hayes in behalf of counsel, leave is granted to file the report and a motion to confirm was submitted by Mr. Hayes on behalf of counsel. In behalf of what counsel? We should expect the motion to be on behalf of counsel of both states or on behalf of the State of Iowa and consented to by the State of Illinois, but Mr. Hayes was apparently suspicious of this telegram himself.

The motion he did submit was as follows:

"Now comes the said plaintiff, the State of Iowa, and moves the Court for an order confirming the report of the commissioners appointed by this Court to determine and mark the boundary line between said States at the nine bridges across the Mississippi river between said States

so far as it relates to the boundary at the Keokuk and Hamilton bridge, at Keokuk, Iowa, upon which report has been made. Said motion is founded upon said report and the record in this case.

(Signed) J. H. Cole,
Walter I. Hayes,
Attorneys for Plaintiff.

Cole is not an attorney, but superintendent of the Bridge Company. It is admitted by Mr. Hayes that Cole is not an attorney, but he says that he conceived the idea that Cole was an attorney, although his name does not appear upon any of the briefs or other papers connected with this suit. Yet it is plain from the telegram that Cole himself was in Washington with Hayes, because the telegram is sent to Hayes, care of J. H. Cole. We shall see later on why it was so sent. No explanation however is given by Mr. Hayes why, if he considered this telegram genuine, he did not appear on the record as the attorney for the State of Illinois, and consent on behalf of that State to the confirmation of the report. The record however shows that the motion was made on behalf of the State of Iowa, and that Hayes appeared on that motion as the attorney for that State. Mr. Hayes, suspicious of the telegram, apparently did not care to have it placed of record that he appeared as the attorney for the State of Illinois and consented to the confirmation of the report.

Mr. Hayes may have stated verbally to the Court that the State of Illinois consented. If he did, it explains why this Court entered the order of April 10th without requiring notice to the State of Illinois. If this be the fact, it was an imposition upon this Court, because this alleged telegram was not sent by Attorney General Moloney, nor by his authority, nor did he know anything about it until he saw the copy of the telegram printed among the papers

of the State of Iowa. The matter was at once examined. The result of this examination appears in the affidavit of the Attorney General filed herewith, and a printed copy of which is attached to this brief.

Mr. George Edmonds is attorney for the Keokuk and Hamilton Bridge Company, and has been such attorney since 1871, as he himself states in his own affidavit filed on this motion.

Mr. Moloney became Attorney General of the State of Illinois on January 11, 1893. He appointed as his own assistant Mr. T. J. Scofield. Mr. Scofield is the son-in-law of Mr. George Edmunds. From March 20th to March 27, 1893, inclusive, Mr. Scofield was sick and confined to his home. Mr. Moloney's home was at Ottawa, Illinois. The Supreme Court also meets at Ottawa, Illinois, and it is the duty of Mr. Moloney as Attorney General to attend the Supreme Court when in session, to take care of the cases in which the People of the State of Illinois are interested. He swears that he was in Ottawa from March 20th to March 22d. and that he returned to Springfield on March 22d, left that city on March 24th and returned to Ottawa, where he remained until April 3d, when he again returned to Springfield. The correspondence at the Attorney General's office was large, and needed constant attention. It was necessary for the Attorney General to be in Ottawa. Mr. Scofield was sick, and he suggested that his father-in-law, Mr. George Edmonds, would come to the Attorney General's office and attend to the ordinary correspondence thereof. From March 22d to March 27th Mr. George Edmonds remained in the attorney general's office attending to the correspondence addressed to said office, and his duties were confined thereto. At that time the Attorney General did not

know that Mr. Edmonds was the attorney for the Bridge Company, nor did he learn that fact until after the adjournment of this Court at its last term. Attorney General Moloney swears that he does not know and never did know Walter I. Hayes or John H. Cole; that he never sent the telegram in question and did not know of its existence until he saw what purports to be a copy of it a few days ago among the affidavits filed in this cause on behalf of the State of Iowa; that upon seeing the telegram he made diligent inquiry in regard to it, and ascertained that it was written and sent by George Edmonds, on Sunday, the 26th day of March, 1893; that George Edmonds had no authority, directly or indirectly, to send said telegram, and that had he, Attorney General Moloney, known of it, he would have repudiated it; that he would not agree to appoint anybody to act on behalf of the State of Illinois in this matter without having an opportunity of personally inspecting and examining said report. He further states positively that no notice was ever given to him, nor was he informed by anybody that the commissioners had made their report, or that an application would be made to this Court to confirm any report of said commissioners; nor did he learn until after the final adjournment of this Court at its last term that the report of said commissioners had been confirmed, or that any report had ever been made by said commissioners.

It therefore appears that Mr. George Edmonds, the attorney for the Bridge Company, without any authority from the Attorney-General of the State of Illinois, sent this telegram, signing Attorney General Moloney's name thereto. He knew, of course, that Cole, the superintendent of the Bridge Company, was in Washington.

The Bridge Company stands behind the State of Iowa in this suit. Cole, in his affidavit, states that there has been litigation between this Bridge Company and various municipalities in Illinois over the question of taxation, in a number of which Mr. A. W. Green has appeared as counsel for the City of Hamilton and the Township of Montebello; all of which culminated by agreement between both parties, and at the suggestion of the attorneys of Illinois, in invoking the aid of the States of Iowa and Illinois to determine the question of the boundary line.

This statement is not true, nor is it in accordance with the statement contained in the affidavit of Mr. George Edmonds, the attorney for the Bridge Company. He states that he applied on behalf of the Bridge Company to Attorney General Hunt to bring suit in this Court against the State of Iowa in the name of the State of Illinois, and that Mr. Hunt refused, but said that if the State of Iowa would bring suit he would appear and answer for the State of Illinois, and that thereupon application was made to the Attorney General of Iowa and suit was brought.

It is quite clear that Mr. Edmonds has been the manager of this suit on behalf of the Bridge Company, the State of Iowa being the nominal plaintiff. He procured the signature of the Attorney General of Illinois to the joint request for the appointment of commissioners, not disclosing to the Attorney General that he was the attorney of the Bridge Company, but presumably acting in the public interest or from friendship to the Attorney General who had appointed his son-in-law as his assistant. Mr. Cole, in his affidavit, admits that the expenses of the commissioners were paid by the Bridge Company, the

reason he gives, being that there was no fund available for that purpose in either State, nor would there be until after the meeting of their respective legislatures. As a matter of fact, the legislature of Illinois was then in session. This, however, is not particularly material. It is, however, material that the telegram relied upon in this case was sent by Mr. George Edmonds, the attorney of the Bridge Company; that it was sent without any authority from the Attorney General of Illinois, and without his knowledge. It was a part of the scheme on the part of Cole and Edmonds after this Court had decided the legal question involved in favor of the State of Illinois, by underhanded means, to wrest from the State of Illinois the fruits of that victory.

Counsel in their brief say that it appears by the affidavit of Mr. George Edmonds that he was in Springfield on the 1st. or 3d. of April, 1893, and then indicated to the Attorney General of the State of Illinois the fact that the report had been filed.

Mr. Edmonds' affidavit on this point is to the effect that "on Saturday 1st or Monday 3d of April, 1893, deponent was at the Attorney General's office of Illinois, at Springfield, and there informed either the Attorney General or his assistant that said report had been filed and motion for confirmation made, and as the time to make a new assessment was near at hand, requested that the matter be attended to at once."

Attorney General Moloney swears that he was not in Springfield on the 1st of April, but that he returned there on the 3d of April, and that he did not see Mr. Edmonds on that day. But why was it necessary to inform the Attorney General of Illinois on the 1st. or 3d. of April that the report had been filed, and request him

to attend to it, if, as is claimed, he had sent a telegram on March 26th authorizing Hayes to appear for the State of Illinois, and consent to the confirmation of the report?

Edmunds without authority on March 26th sends this telegram to Hayes, care of Cole, and says that he walked into the Attorney General's office at Springfield on the 1st or 3d of April, and told him that the report had been filed and requested him to attend to the matter. Further comment on these facts would seem to be unnecessary. The State of Illinois never agreed to the confirmation of this report. It never had any notice that the report would be presented for confirmation, and the statements in regard thereto in the petition filed on behalf of the State of Illinois are strictly true.

III.

MERITS OF THE CONTROVERSY.

Counsel for the State of Iowa claim "that the main channel of the Mississippi river at the point where crossed by the Keokuk and Hamilton Bridge is substantially from the west bank of Island No. 4 to the Iowa shore, and was navigable from bank to bank." Even if the river was navigable from bank to bank at this particular point for boats crossing the river, it would not follow that the channel of commerce used by steamboats and other vessels engaged in the carrying trade up and down the river extended from bank to bank. There might be a pathway across the river which ferry and other boats could use; but that has no bearing on the question to be determined in this case. Yet a great part of the affidavits filed on behalf of the State of Iowa are taken up with statements in regard to this cross-channel.

We are to ascertain in this case the main navigable channel usually followed by vessels engaged in the carrying trade, and the middle of that channel is the boundary line. It is not expected that the exact location of this channel shall be fixed upon this motion. The question on this motion is whether the commissioners have correctly fixed the boundary line. If they have not, then the order, so far as it confirms the report of the commissioners, should be set aside. Counsel for the State of Iowa say that the "boundary line was located entirely with reference to the navigability of the stream. The measurement in Illinois was made from 200 to 250 feet west of the shore line, and the measurement from the Iowa shore was made some fifty feet east of the shore line, and these two points west of the shore of Island No. 4 and east of the Iowa shore were located with reference to the navigability of the river at and between said points."

If this be true, then the line was not fixed by the commissioners at the proper point on their own showing, as will appear from an examination of the plat filed by the commissioners with their report. This plat shows that the commissioners fixed the shore lines and established the boundary line exactly midway between these two shore lines, being 1,461.35 feet from the Iowa shore, and 1,461.35 feet from the Illinois shore.

Turning now to the joint affidavit of Carpenter and Meigs, they state that they "took a point 500 feet east of the easterly Illinois abutment of said bridge, said abutment having been constructed about 700 feet into the river west of the original shore to island number 4, and then measured westerly to a point about 200 feet west of the abutment of the Iowa shore, said abut-

ment being about 250 feet east of the Iowa shore." That would make the western boundary of the channel, according to the commissioners, fifty feet east of the Iowa shore, and the middle of the channel would be midway between that point and the Illinois shore. The plat shows that the boundary line is fixed exactly midway between the two shores. Therefore, if the statement in the affidavit is correct, the boundary line is twenty-five feet out of the way. Again, on the plat of the commissioners there is marked the "approximate low water line of "river." It would hardly seem as if the distance between the low water line and the shore line as established by the commissioners could be a part of the main navigable channel of the Mitsissippi river, but according to their affidavit it is included in that channel.

In this joint affidavit it is stated that "within the bed of the main stream there is an artificial channel in the narrower sense lying along the Iowa shore, which is *purely artificial*, and was excavated in the solid rock." It is claimed on behalf of the State of Iowa that in ascertaining the channel it must be ascertained as it was before the bridge was built, and as the channel existed in its natural state, and yet these commissioners include as a part of the channel this purely artificial channel mentioned in the affidavit. This plat filed by the commissioners with their report shows the steamboat channel. The west portion of that steamboat channel, we understand, is the artificial channel spoken of in the affidavits. It is not a part of the navigable channel referred to in the affidavits filed on behalf of the State of Illinois. The eastern portion of the steamboat channel is marked on the plat of the commissioners, being that portion east of the pivot pier, and is a portion of the original main navigable channel.

An examination of this plat filed by the commissioners with their report, we submit, must convince any one that the boundary line was fixed by first establishing the shore lines and then taking a point midway between the two shore lines as the boundary line.

As we have stated, it is claimed on behalf of the State of Iowa, that the boundary line is not to be determined by the condition of the bed of the river at the present time, but that it must be determined by the location of the main navigable channel prior to the construction of the Keokuk and Hamilton Bridge and before any changes were made by artificial means. Let us concede that proposition. Do the affidavits filed on behalf of the State of Iowa sustain the proposition that the boundary line as fixed by the commissioners is the middle of the the main navigable channel determined in this manner? We have already shown that the joint affidavit of the two commissioners proves that even on their own showing the line is not corectly fixed.

Taking the affidavits filed by the State of Iowa as a whole, there is very little said in any of them in regard to the real question in issue here. A great part of them is taken up in attempting to show that there was a passage way for ferry and other boats from the Iowa shore to the shore of Island number four. Even this passage way was at some distance below the bridge. For instance, C. C. Carpenter swears that " lumber that is designed for points in Illinois oppo- " site Keokuk, Iowa, is brought down through the canal " and down through the pivot span of the Keokuk and " Hamilton Bridge to where there is good water and " taken across the river below said bridge and landed on " the Illinois shore." (Complainant's Rec., 40.) Henry

B. Whitney swears that he has crossed and recrossed the river repeatedly at a point about 400 feet east of the Iowa shore, and about 150 yards below the above named bridge. (Complainant's Rec., 38.) There are other affidavits to the same effect. Other portions of the affidavits speak of a certain warehouse on the west shore of Island number 4. Just where this warehouse was located the affidavits leave in doubt. One of the plats shows it at the end of a dyke built out in the river. But all such matters in the affidavit seem to us to be immaterial.

It may be conceded that, at certain seasons of the year, steamboats made landings at certain places on Islands numbers 2 and 4. It may also be conceded that the river near the Illinois shore at Hamilton was as good for navigation as it was near the Iowa shore at Keokuk before the bridge was built. We have never claimed that the main navigable channel extended to the Iowa shore. It might just as well be said that at low water the river is navigable from bank to bank. The difference between high and low water is sometimes, we are informed, as great as twenty-two feet, and in extreme high water Island number 4 itself is navigable. The real question to be decided in this case is,—where is the main navigable channel of the river usually followed by vessels engaged in the carrying trade up and down the river? Upon this question the affidavits filed on behalf of the State of Iowa are strangely silent. Meigs and Carpenter, two of the commissioners, it is true, state that the whole width of the main arm of the Mississippi River between the points specified in their affidavit was the channel of navigation of the Mississippi River, but other portions of their affidavit qualify considerably this statement, and their affidavit also shows, as we have said, that they

have not even, by their own showing, correctly fixed the boundary line on the plat filed with their report. They do not, however, pretend to swear that prior to the construction of the Keokuk and Hamilton Bridge the main navigable channel of the river usually followed by vessels engaged in the carrying trade extended from shore to shore. In fact, they do not show that, of their own knowledge, they were qualified to give any testimony upon that point. They say that they examined authenticated maps and soundings made by the engineering corps of the United States Army during the last fifty years, but it is a significant fact that no copy of any of these maps is filed with these papers.

Among the affidavits filed on behalf of the State of Iowa on this motion is an affidavit by Albert Wempner, the other commissioner, in which he seeks to explain an affidavit made by him in the case of the *Keokukand Hamilton Bridge Company* v. *Bertschi*, in which the same question was involved as in this case. The affidavit made by Wempner in that case is as follows:

IN THE CIRCUIT COURT OF HANCOCK COUNTY, ILLINOIS.

Keokuk and Hamilton Bridge Company, *Complainants*, vs. John W. Bertschi, County Treasurer and ex-officio Collector of Hancock County, Illinois, and William M. Guthrie, Assessor of the Town of Montebello, *Defendants*. } *Affidavit.*

STATE OF IOWA, } ss.
LEE COUNTY. }

Albert Wempner, being first duly sworn, doth depose and say that he is a resident of Keokuk, Iowa, and has been engaged as master and pilot of steamboats on the

Mississippi River, most of the time since the year 1852; that he is entirely familiar with the Mississippi River at and near the city of Keokuk, Iowa, and was for many years prior to the building of the Keokuk and Hamilton bridge at that point; that before the building of said bridge the only channel in said river at or near the place crossed by said bridge along which vessels in the carrying trade did or could pass, was near the Iowa shore, the west line of said channel being where the pivot pier of said bridge now stands, and the east line of said channel at a point between three hundred and four hundred feet east of where said pier now stands; that the above described channel was the only channel at this point that could be or was used for the purpose of commerce on said river, the water east of said channel being too shallow in an ordinary stage of water to be used by vessels engaged in the carrying trade; that the only change in said channel at said point, since said bridge was built, was made by artificial means, by blasting and removing the rock-bed of the river and extending said channel westward to the west abutment of said bridge.

In witness whereof I have hereunto set my hand this 25th day of April, A. D. 1891.

ALBERT WEMPNER.

Subscribed and sworn to before me this 25th day of April, A. D. 1891.

ALANSON L. PARSONS,

(L. S.) Notary Public in and for Lee County, Iowa

(Deft's. Rec., p. 27.)

In his affidavit, filed upon this motion, he makes the following statement in regard to his former affidavit:

That I have not had submitted to me the original of said affidavit, and as to the correctness of the copy I am unable at this time to state. I state, however, that the said affidavit, said to have been made by me on or about the 25th day of April, 1891, was made, to some extent, upon a misapprehension of the facts; that while acting as pilot upon the Mississippi River, boats engaged in the carrying trade, going north of the city of Keokuk, as a matter of convenience, ordinarily selected a channel running nearer the Iowa shore than to the Illinois shore; that

where my affidavit states "that said boats could not go easterly at a point in the vicinity of the Iowa shore in said channel," I was mistaken, and that portion of the affidavit was not called to my attention at the time of making same, as I have personally known for a great many years that the Mississippi River at a point between Keokuk, Iowa, and Hamilton, Illinois, at the place where the Keokuk and Hamilton bridge is located, was prior to the location of the bridge navigable for steamboats engaged in the commerce of said river. (Complt's. Rec., p. 18.)

It will be observed that the only statement in his first affidavit in which he claims he was mistaken is, "that "said boats could not go easterly at a point in the vicinity "of the Iowa shore in said channel." We find no such statement in his first affidavit. As a matter of fact, his present affidavit does not contradict his former affidavit as far as it relates to facts within his own knowledge. He does say, of his own knowledge, that the Mississippi River at the place where the Keokuk and Hamilton bridge is located was prior to the location of the bridge navigable for steamboats engaged in the commerce of the river; but he does not state where the navigable channel was located. He also states that after he was appointed commissioner he made careful examinations of the bed of the river, and examined surveys and plats of the same, with a view of ascertaining the middle of the main navigable channel, and became satisfied that the middle of said channel was at the point named in his affidavit, which, by the way, is not the point marked on the plat filed with the commissioners' report.

But it was unnecessary, according to his former affidavit, for him to make any examinations of plats or surveys, because according to that affidavit he had personal knowledge from the year 1852 in regard to the location

of the navigable channel used for the purposes of commerce on the river, and he locates it at the same place as it is located in the affidavits filed on behalf of the State of Illinois on this motion, "the west line of said channel being where the pivot-pier of said bridge now stands, and the east line of said channel at a point between three and four hundred feet east of where said pier now stands." It is also a significant fact that in this former affidavit he calls attention to the change in the channel since the bridge was built, made by blasting and removing the rock-bed of the river and extending the channel westerly to the west abutment of said bridge. These two affidavits of Wempner illustrate quite clearly the difference between the affidavits filed upon this motion by the State of Illinois and the State of Iowa. Wempner's first affidavit is directly to the point in issue. The last affidavit of Wempner entirely evades that point. We may add that Wempner in his last affidavit does not deny the statement in Waggoner's affidavit, that Wempner told him that in fixing the boundary he, Wempner, did not consider that the channel used by boats had anything to do with the matter. (Deft's Rec., page 37.)

George Edmonds also makes an affidavit in regard to the condition of the river, for Mr. Edmonds is not only the attorney of the Bridge Company, but he has been a civil engineer and a stone contractor, and has also occupied other positions as disclosed by this record. He says that in his opinion before the construction of the dam and dyke referred to in his affidavit any steam or other boat that could pass over the rapids at any stage, high, low, or medium water, could as easily and safely pass over any part of said river between said island and said Iowa shore as it could pass over said rapids. But the ques-

tion here is not what steamboats could do but what they did do. What course did they usually follow in going up and down the river?

Hamilton's affidavit on this point is to the same effect, and merely gives his opinion. Whitney's affidavit refers more particularly to the cross channel in the river. The same may be said of the affidavits of Sample and Conn.

Jones's affidavit proves too much. He says: "I find by careful measurements that at a point 250 feet from the Iowa shore line there is at this date with a stage of 1.4 feet above low water no water at all at that point, and that it would be necessary to go at least fifty feet further to reach the west abutment of said bridge." (Complt's. Rec., 43) The west abutment of said bridge, therefore, would be 300 feet from the Iowa shore. Fifty feet west of the abutment there is no water, and yet the commissioners in their affidavit say that the westerly line of the navigable channel is 200 feet westerly from the west abutment of said bridge, so that in 150 feet of this channel, which, it is claimed, is the main navigable channel of the Mississippi River used by vessels at all seasons of the year, there is no water at all.

These are samples of the affidavits filed on behalf of the State of Iowa on this motion. In great part they do not touch the issue at all. Where they do touch the issue, they are shown to be incorrect.

The affidavits filed on behalf of the State of Illinois are directly in point and made by persons who had personal knowledge of the location of the navigable channel for many years prior to the building of the bridge. They are to the effect that before the Keokuk and Hamilton bridge was built the navigable channel originally used and along which vessels in the carrying trade passed,

was near the Iowa shore; the west line of said channel was where the pivot pier of said bridge now stands, and the east line at a point not exceeding 400 feet east of where said pivot pier now stands; the above described channel was the only channel in said place where vessels engaged in the carrying trade could pass. (Deft.'s Rec., pp. 34, 35, 36, 29, 33.)

Counsel say that the boundary line of a state could hardly be determined upon the statements contained in these affidavits. That is entirely true. It is not asked or expected that the Court, on this motion, will proceed to fix the boundary line, but these affidavits do show conclusively that the middle of the main navigable channel is not at the point fixed by the commissioners as the state boundary line. We do not expect this Court to fix the line on *ex parte* affidavits on either side, but it is quite clear from all the affidavits that the line was not correctly fixed by the commissioners.

There is another aspect of this case which seems to have escaped the attention of the counsel for the State of Iowa. If their contention on this motion is correct, then this suit is an imposition upon this Court. If the main navigable channel in fact extends from shore to shore, then there was no question of law to be decided between the State of Illinois and the State of Iowa. But such is not the case made by the pleadings. The original bill of the State of Iowa claims that the boundary line is the middle of the Mississippi River; "yet said State of Illinois and its several municipalities bordering on said Mississippi River, claim the right to and do assess and tax as in Illinois, all bridges and other structures in said river from the Illinois shore to the middle of the steamboat channel or channel of said river usually tra-

versed by steam and other crafts in carrying the commerce of said river regardless of whether said channel is east or west of the middle of the main body or arm of said river." The bill also alleges, "That the steamboat channel or channel of the river where boats ordinarily run in carrying the commerce of the river varies from side to side of said river, sometimes next to the Illinois shore and then next to the Iowa shore, and at other times crosswise at most points in said river shifting from place to place as the sands of its bed are changed by the current at every stage or change of water; that at the point of the Keokuk and Hamilton bridge the river bed is rock and not subject to much change; that at that point, were it not for the bridge, the middle of the steamboat channel would be and was before said bridge was erected, fully 300 feet east of the east end of the draw in said bridge, or 880 feet from the Iowa shore of said river, and 2,162 feet from the shore of said river in Illinois on Island No. 4."

In the cross-bill of the State of Illinois it is alleged that the State of Iowa assesses and taxes the bridges to the middle of the main body of said river, while the State of Illinois assesses to the middle of the channel usually traversed by steamboats in navigating said river, and "that the middle of the steamboat channel, or that part of the river usually traversed by steamboat men in navigating said river, is at or near the east end of said draw or pivot span about 380 feet from the west abutment, and 1,812 feet from the east abutment."

The answer of the State of Iowa to this cross-bill admits "that said State of Illinois and its several municipalities bordering on said river, claim the right to tax said bridges from the Illinois shore of said river to the

middle of the channel of commerce, or steamboat channel—that is, the channel usually used by steamboats and other crafts in navigating said river—and that this respondent, the State of Iowa, and its several municipalities bordering on said river, claim the right to, and do tax said several bridges to the middle of the main arm or body of said river, regardless of where the channel of commerce or steamboat channel—that is, that part of said river usually traversed by steam or other vessels carrying the commerce of said river—may be."

It was conceded by these pleadings that the navigable channel usually followed, was near the Iowa shore; they differ as to the exact location of this channel, but they all agree that it is west of the middle of the main body of the river. The contention between the two states, both in this Court and in all prior litigation, was whether the boundary line was the middle of this channel of navigation or the middle line between the two shores. This Court in its opinion thus states the contention:

"The Mississippi River flows between the States of Iowa and Illinois. It is a navigable stream, and constitutes the boundary between the two states; and the controversy between them is as to the position of the line between its banks or shores which separates the jurisdiction of the two states for the purposes of taxation and other purposes of government.

The complainant, the State of Iowa, contends that, for taxation, and for all other purposes, the boundary line is the middle of the main body of the river, taking the middle line between its banks or shores without regard to the 'steamboat channel,' as it is termed, or deepest part of the stream, and that, to determine the banks or shores, the measurements must be taken when the water is in its natural or ordinary stage, neither swollen by floods nor shrunk by droughts.

On the other hand, the defendant, the State of Illinois, claims that, for taxation and all other purposes, its jurisdiction extends to the middle of 'the steamboat channel' of the river, wherever that may be, whether on its east or west bank—the channel upon which commerce on the river by steamboats or other vessels is usually conducted, and which for that reason is sometimes designated as 'the channel of commerce.'"

The State of Iowa cited on behalf of its contention the case of *The Dunlieth and Dubuque Bridge Company* v. *the County of Dubuque*, 55 Iowa, 558, wherein the Supreme court of Iowa decided that the boundary line was the middle of the river measuring from bank to bank. The State of Illinois cited on behalf of its contention the case of *Buttenuth* v. *St. Louis Bridge Company*, 123 Ill., 535, wherein the Supreme court of Illinois decided that the boundary line was the middle of the channel of commerce. This Court, it is conceded, decided in accordance with the contention of the State of Illinois.

Now, the State of Iowa turns round and in face of the contention of itself and its municipalities through all these years attempts to change front and says that the channel of commerce extends from shore to shore. If this were so, then this suit, as we have said, was an imposition upon this court; but it is not so. It is clear from the pleadings in this case, it is clear from the affidavits filed upon this motion that the main navigable channel of the river—the channel of commerce used by vessels engaged in the carrying trade, is not the same as the river from bank to bank; that this channel of commerce is, and was before the bridge was built, near the Iowa shore.

It seems to us equally clear that the commissioners located the boundary line by fixing the shore lines, and

taking a point midway between those two lines, fixed upon that point, because it was midway between the two shores, thus fixing the boundary line at the exact point which the State of Iowa claimed in its pleadings was the boundary line.

We respectfully submit, therefore, that this partial report of the commissioners is erroneous, that the order confirming this report should be set aside, that the report itself should also be set aside and an order entered in accordance with the prayer of the petition of the State of Illinois.

Respectfully submitted.

M. T. MOLONEY,
Attorney General of the State of Illinois.

A. W. GREEN,
HENRY S. ROBBINS,
Of Counsel.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1893.

The State of Iowa
vs.
The State of Illinois. } *Original Suit in Equity.*

STATE OF ILLINOIS, }
COUNTY OF COOK. } ss.

Maurice T. Moloney, being duly sworn, doth depose and say as follows:

I am Attorney General of the State of Illinois, and have been such since the eleventh day of January, A. D. 1893. By the law of this State I was entitled to only one assistant when I assumed control of said office, and that condition of affairs continued until the first day of July last past. On assuming control of said office I appointed Mr. T. J. Scofield as my assistant. The said T. J. Scofield is the son-of-law of Mr. George Edmonds, who has made an affidavit in this cause on behalf of the State of Iowa. During the latter part of the month of March and including from the 20th to the 27th of said month my said assistant, Mr. Scofield, was sick and confined to his bed in his home in the city of Springfield. During said time the Supreme Court of the State of Illinois was in session in Ottawa, La Salle County, in said State. The said city of Ottawa is and has been my home since assuming the said office, and I have not yet removed my family from the city of Ottawa to the said city of Springfield, and it is and

has been my custom to return to Ottawa to my family on Saturday of each week.

I further state that it is made by law my duty to attend the Supreme Court of the State of Illinois at each session thereof and write briefs in People's cases on behalf of the People.

I further state that I have made it a rule to keep an exact account of the number of days that I have been absent from the city of Springfield since the 11th day of January last past. On the 20th day of March, at 11:40 A. M., I left the city of Springfield and went to Ottawa, and returned from said last named city on the night of the 22d of March, and remained in the city of Springfield until the night of March 24th, when I again left said city of Springfield and returned to the city of Ottawa, where I remained until the 3d day of April following, when I returned to the city of Springfield on said last named date. From the 24th to the 3d day of April aforesaid I was in attendance on the Supreme Court of the State of Illinois, then in session in Ottawa, and during said time was engaged in comparing abstracts and records, and writing briefs on behalf of the People in People's causes then pending at the March term of said court.

I further state that the legislature of the State of Illinois was, during the month of March, in session in Springfield, and numerous questions from that source were being propounded to me which required immediate answers. The volume of business coming to said office was quite large, and, in my opinion, required immediate attention. Inasmuch, therefore, as my assistant was confined to his home by sickness, and as I was compelled to be in Ottawa attending the Supreme Court, my said assistant, Mr. Scofield, suggested that his father-in-law,

Mr. George Edmonds, would come to my office and attend to the ordinary correspondence thereof during my absence therefrom. From the 22d of March until the 27th of said month, inclusive, the said George Edmonds remained in my office, attending to the correspondence addressed to said office, and his duties were confined thereto. The first knowledge that I had of said cause was when Mr. George Edmonds requested me to sign the joint request to appoint commissioners. I did not know at that time that Mr. Edmonds was attorney for the Keokuk and Hamilton Bridge Company, and did not learn such fact until after the adjournment of this court at its last term.

It is stated in the affidavits in this cause on this motion filed on behalf of the State of Iowa that I sent a telegram on the 26th day of March to one Walter I. Hayes, which said telegram is as follows, to wit:

To Walter I. Hays, Cr. J. H. Cole, Washn.

You are authorized to appear in Sup. Court of U S. in case of *Iowa* v. *Illinois*, and consent to the confirmation of the report of Commissioner as to line at Keokuk and Hamilton Bridge.

M. T. MALONEY.

I do not know, and never did know, the said Walter I. Hays, or the Mr. Cole in whose care said telegram purports to have been sent. I am now informed that the said Mr. Cole is the superintendent of the Keokuk and Hamilton Bridge Company referred to in the brief filed herein on behalf of the State of Illinois. I never sent said telegram, and did not know of its existence until I saw what purports to be a copy of it a few days ago among the affidavits filed in this cause on behalf of the State of Iowa. Upon seeing said telegram so printed as aforesaid, I made diligent inquiry in relation to the same,

and ascertained that it was written and sent by the said George Edmonds on Sunday, the 26th day of March, 1893, to the said Walter L. Hays, in care of said Mr. Cole. The said George Edmonds had no authority directly or indirectly from me to send said telegram, and had I known of it I would have repudiated the same. I would not agree to appoint anybody to act for or on behalf of the State of Illinois in this matter without first having an opportunity of personally inspecting and examining said report. Said telegram was sent as aforesaid without my authority or knowledge, and I only learned of it as hereinbefore stated. I did not see Mr. Edmonds in my office on the third day of April, 1893, nor at any other place on that day.

I further state positively that no notice was ever given to me nor was I informed by anybody that the said commissioners had made their report or that an application would be made to this court to confirm any report of said commissioners, nor did I learn until after the final adjournment of this court at its last term that the report of said commissioners had been confirmed or that any report had ever been made by said commissioners.

Subscribed and sworn to
before me, this 14th day of
November, A. D. 1893.

MAURICE T. MOLONEY.

FRANK M. PETERS,
Notary Public.

[NOTARIAL SEAL.]

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Office Supreme Court U. S.
FILED.
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JAMES H. McKENNEY,
CLERK.

IN THE
Supreme Court of the United States,

October Term, 1893

STATE OF IOWA, *Complainant.*

vs.

STATE OF ILLINOIS, *Defendant.*

ORIGINAL SUIT IN EQUITY NO. 5.

STATEMENT AND AFFIDAVITS ON BEHALF OF THE STATE OF IOWA IN RESPONSE TO NEW MATTER SET OUT BY STATE OF ILLINOIS IN ITS REPLY.

JOHN Y. STONE,
Attorney General, State of Iowa.

JOHN F. LACY,
FELIX F. HUGHES,
JAMES C. DAVIS,
} *Of Counsel.*

IN THE
Supreme Court of the United States,

October Term, 1893

STATE OF IOWA, *Complainant.*

vs.

STATE OF ILLINOIS, *Defendant.*

ORIGINAL SUIT IN EQUITY NO. 5.

STATEMENT AND AFFIDAVITS ON BEHALF OF THE STATE OF IOWA IN RESPONSE TO NEW MATTER SET OUT BY STATE OF ILLINOIS IN ITS REPLY.

I.

The State of Iowa respectfully asks leave to submit the affidavits of Mr. John H. Cole and Mr. George Edmunds in response to the new matter set out in the affidavit of Mr. Moloney on behalf of the State of Illinois.

Counsel for the State of Iowa regret the complication which seems to have arisen in the office of the Attorney General of the State of Illinois. It is due to counsel on behalf of the State of Iowa to further say that the matter set forth in the affidavit of Mr. Moloney of date November 14th, 1893, was a complete surprise to the several counsel of the State of Iowa.

The conduct of this case, from its inception, has been amicable in its character. The progress of the cause in matters requiring notice to counsel has been entirely informal. Mr. George Edmunds, an attorney of high standing and long practice at the bar of Illinois, by reason of his personal acquaintance with Attorney General Hunt, and the successor of Attorney General Hunt, Mr. Moloney, has obtained from counsel for the State of Illinois agreements which have been made as the cause progressed, and when notice was necessary, has informed the Attorney General of the State of Illinois when matters occurred which required notice.

It was with some reluctance that counsel for the State of Iowa have felt obliged to set out the affidavit of Mr. Edmunds of date November 22d, 1893, but as same clearly and fairly details the facts as they actually occurred, it was deemed a duty upon the part of counsel that the Court should have this information. It has appeared to counsel for the State of Iowa, and we believe it will so appear to the Court, that from the amicable and friendly character of this controversy that the telegram sent from the Attorney General's office of the State of Illinois, on the 26th day of March, 1893, was entirely proper matter to have been forwarded. The Commission appointed by agreement had made its report; that report, unless fraudulent, would ordinarily be binding upon both, parties; the charge made on behalf of the State of Illinois that the confirmation was obtained for the benefit of the Keokuk & Hamilton Bridge Company, is hardly fair in view of the fact that it was a matter of entire indifference to the Bridge Company where the line was located, the purpose being to have it definitely and permanently located at some particular point.

In a controversy of this character the State of Iowa does not desire to obtain any advantage upon a technicality, or have the boundary line located unless same is done strictly in accordance with the decision of this Court, and in accordance with the facts as they actually exist. In this connection, however, we deem it fair to submit to the Court.

1st. That under the circumstances of the case Mr. T. J. Schofield, the Assistant Attorney General of the State of Illinois, was not only authorized, but justified, in sending the telegram in question.

2d. That Judge Edmunds, acting as the Attorney General of the State of Illinois, not knowing the contents of the report in controversy, and in good faith believing that by reason of the amicable nature of the case same would be binding upon both parties, was justified in submitting the question of sending the telegram to Mr. Schofield.

II.

The Court will pardon a brief reference on behalf of the State of Iowa, to the merits of the controversy. We presume if the report of the Commissioners was now presented for the first time to the Court, the Court would confirm same, if it appeared the Commissioners acted in good faith and located the line in accordance with the facts and the rule as to the location of the boundary line as adopted in the opinion promulgated by this Court. In other words, if the report is right upon its merits, independent of the controversy which has arisen in the Attorney General's office of the State of Illinois, it should be confirmed.

Counsel for the State of Illinois misapprehend

the method by which the Commissioners arrived at the boundary line in controversy. On page 17 of the argument in reply it is contended that the Commissioners fixed the shore line and established the boundary line exactly midway between said shore lines. The affidavit of the Commissioners (Com. Rec. 16.) says: "We conclude that under the provisions of the opinion of this Court in the above entitled cause, the main channel of the Mississippi River which was navigable for steamboats that ordinarily navigate said river, eliminating from same recent artificial obstructions, is between a point 500 feet east of the easterly end of said bridge and 200 feet west of the westerly end of said bridge." And while on the plat submmitted by said Commissioners the extreme points from which the boundary line was measured is marked "east bank of river as established by commissioners," and "west bank of river as established by commissioners," their affidavits explain that the easterly bank of the navigable channel as fixed by the commissioners is 200 feet west of the easterly original shore of Island No. 4, in Illinois, and the westerly bank of the navigable channel as fixed by the commissioners is 50 feet east of the original westerly shore in Iowa. The lines marked "east and west bank" as fixed by said commissioners upon said plat being the easterly and westerly limit of the navigable channel as fixed by said commissioners.

In the affidavit of James Campbell, on behalf of the State of Illinois, (Deft's. Rec. 29.) he describes an obstruction 400 feet east of the Iowa shore and about 150 yards below where the Keokuk & Hamilton Bridge now terminates.

The affidavits of H. B. Whitney, (Com. Rec. 38), W. S. Sample, (Com. Rec. 46), John Smith, (Com.

Rec. 49), Henry Conn, (Com. Rec. 51), H. R. Dickinson, (Com. Rec. 56), John H. Cole, (Com. Rec. 25) all disprove this statement. The profile of Mr. McMath, submitted by defendants, shows that after eliminating artificial obstructions recently placed in the river, that Wagner, Campbell. Brown, Ferris and Owen, (defendants' witnesses) were not correct in their statements either as to channel or deep water, as this profile plainly showed an average depth of water east of the point fixed by all these witnesses as the eastern boundary of the channel, i. e., from 300 to 400 feet east of pivot pier, greater than it is in the channel they describe with the exception of the pocket or hole near station 1600 of said profile.

If the court will now examine this profile and make the allowances for measurements taken on cribs and other artificial obstructions of recent origin, and compare it with the profile of Mr. Willey. (Com. Rec. 21-22), and the correctness of which has not been disputed, they will find that all of the above defendants' witnesses were simply mistaken as to the extent of the channel.

It is to be noted that the learned counsel for the State of Illinois fail to explain the unfairness of the plat as preseuted by McMath, and no denial in any form is made of the facts clearly showing that the soundings in the McMath plat were taken on top of cribs and other artificial obstructions recently placed in the river. No criticism is made as to the entire good faith on the part of the commissioners in making their report. Their competency to perform the work alloted to them is not questioned. It is conceded by counsel for the State of Illinois that the boundary line should be located independent of recent

artificial obstructions. We believe a careful examination of the record will disclose the fact that the merits of the controversy upon the report of the commissioners are wholly in favor of sustaining the report and that the commissioners in locating the boundary line, determined where the main navigable channel of the Mississippi River was located, and fixed the boundary in the middle of said channel.

It is respectfully submitted that the report of the commissioners should stand confirmed.

Respectfully submitted,

JOHN Y. STONE,
Attorney General, State of Iowa.

JOHN F. LACY,
FELIX T. HUGHES,
JAMES C. DAVIS,
} *Of Counsel.*

IN THE SUPREME COURT OF THE UNITED STATES.

STATE OF IOWA, *Complainant,*
vs.
STATE OF ILLINOIS, *Defendant.*
} Original No. 5.

State of Iowa,
Lee County,
} ss.

I. John H. Cole, on my oath, duly administered, do depose and say, that I am the same John H. Cole who has heretofore made affidavit in this cause on behalf of the State of Iowa; that my attention has been called to the affidavit of Maurice T. Moloney, of date November 14th 1893, filed on behalf of the State of Illinois, in which Mr. Moloney refers to a telegram sent on the 26th day of March, 1893, to Walter I. Hayes; that said telegram appears to have been sent in my care at Washington, D. C., I state that on the 26th day of March, 1893, I was not in

the City of Washington, D. C., nor upon any other day in said month, but with the exception of possibly a day or two's absence I was continuously in the City of Keokuk, Iowa, where I reside, during the said month of March, 1893; that I do not know why said telegram was sent in my care, and the first knowledge or information that I had that said telegram was sent in my care was when the original telegram was exhibited to me in in connection with the affidavit of Walter I. Hayes, made in this cause; that as I had had correspondence with George Edmunds in the letter hereinafter referred to, written from the City of Keokuk, Iowa, said George Edmunds knew I was not in the City of Washington, D. C., and would therefore not have sent a telegram in my care at said place. That upon inspection of the affidavit, as made by Mr. Moloney in this cause, of date November 14th, 1893, I called upon Mr. George Edmunds at Carthage, Illinois, on the 20th of November, 1893, with a copy of the affidavit of said Moloney for the purpose of ascertaining the facts concerning said telegram; that said Edmunds, upon the said 20th day of November, 1893, detailed to me the circumstances connected with the sending of said telegram, and agreed to forward to the attorneys of the State of Iowa for use in this controversy, an affidavit setting forth said facts in detail; that on the 22d day of November, 1893, said George Edmunds sent to Keokuk, Iowa, an affidavit in his own handwriting, verified before John D. Miller, County Judge of the Hancock County Court of Illinois, which affidavit so forwarded by said George Edmunds, was in words and figures following, to-wit:

IN THE SUPREME COURT OF THE UNITED STATES.

THE STATE OF IOWA,
vs.
THE STATE OF ILLINOIS, } Original.

State of Illinois,
Hancock County. } ss.

George Edmunds, being duly sworn, says that he is father-in-law of T. J. Schofield, the Assistant Attorney General of the State of Illinois, and was in March, last.

That at the request of the Attorney General of Illinois, deponent was at the office of the Attorney General, at Springfield, Illinois, most of the time from the 20th to the 30th of March, 1893, endeavoring to perform the duties of Attorney General. That his performance of such duty was not of his own seeking, but by request to keep the office running in the absence of the Attorney General, Moloney, on business, and absence of said Schofield, his assistant, caused by sickness.

That T. J. Schofield, said assistant, knew de-deponent had for years been attorney of the Keokuk & Hamilton Bridge Company, in Illinois, and that this cause was pending, and when deponent sent the agreement for the appointment of commissioners in this cause to the Attorney General, which he signed, in the opinion of deponent Attorney General Moloney knew the relation deponent held to the Bridge Company. He could have known by inquiring of his assistant.

That on November 10th, 1893, by request, deponent prepared, swore to and sent to Attorney General Moloney, for use by him an affidavit in this cause,

omitting the title of same, venue and jurat, said affidavit is as follows, viz.:

"George Edmunds, being duly sworn, says that some and most of the time from March 20th to March 30th, 1893, deponent was in the office of the Attorney General of Illinois, at the request of the Attorney General and his assistant, endeavoring to perform the duties of the office, in the absence of the Attorney General on business elsewhere, and of the assistant from sickness. That about the 26th of March, 1893, there was delivered at the office a telegram stating that the commissioners in the case of Iowa vs. Illinois had made their report, and asking that the Attorney General have some one appear in the Supreme Court of the United States so that the report could be confirmed at the term then in session. That deponent, in the absence of General Moloney, took the telegram to T. J. Schofield, the Assistant Attorney General of Illinois, and Mr. Schofield telegraphed some one at Washington to appear for Illinois, in the matter. I suppose the telegram was in the name of M. T. Moloney. At this time I had no knowledge of what the report was, or where the line was fixed by said report and did not have until after April 10th, 1893. The deponent has for years been the attorney of the Bridge Co., and now states that during all his connection with that Company his opinion and the feeling of the Bridge Company has been that it was of no consequence to it, the Bridge Co., where the line was fixed, if fixed so as to prevent taxation in both states of the same property."

That affidavit Mr. Moloney should have received on Saturday, November 11th, three days before he

made his affidavit, in this cause, on the 14th of November. If Mr. Moloney received that affidavit he could no doubt have learned that the statements therein were true by inquiring of his assistant, Schofield, or from an inspection of the original telegram at Springfield telegraph office, that the telegram to Hayes was not signed in my handwriting, but was in the handwriting of T. J. Schofield, his assistant.

I further state that I never at any time sent a telegram directed to Hayes, or any other person at Washington, D. C., to which I signed the name of M. T. Moloney, or to which I procured any other person to sign the name of M. T. Moloney.

I further state that I was at the Attorney General's office on either the 1st or 3d of April, 1893. I do not think I saw Mr. Moloney at that time, yet I may have done so, but I did not see Mr Schofield. My belief is it was the 3d of April, from the fact that I find in my letter book a letter dated April 1st and none after that until April 4th. Further our town meeting was on the 4th of April and I think I was at Springfield the day before Town meeting.

Deponent further states that he has always understood this suit to be an amicable one to settle the boundary between the states. It was brought at deponent's suggestion to settle the extent to which each state could tax bridges across the Mississippi River and prevent overlapping of such taxation as for some years had existed at the Keokuk & Hamilton Bridge. with a view to that end deponent prepared a full set of pleadings for such proceedings in this Court, presenting both sides of the case, and submitted to the then Attorney General of Illinois, George Hunt, and asked him to bring suit on behalf of Illinois. Mr.

Hunt took the proposed pleadings and said he would look into the matter. After some days Mr. Hunt returned the proposed pleadings to me, declining to bring the suit, but said if Iowa would bring the suit he would answer for Illinois. I then prepared the pleadings now on file in this cause and the matter was submitted to the Attorney General of Iowa. He signed the bill and I sent a copy of the bill with an answer, (the same as now on file) for Illinois and its cross bill, and forwarded to Attorney General Hunt, at Springfield. He signed the answer and cross bill and Attorney General Stone, of Iowa, signed the answer to cross-bill and replication to answer of Illinois, and I think all were forwarded together to the Clerk of this Court, and filed by him. The effort on my part was by the pleadings to present fully and fairly both sides of the case, having personally no feeling or care and that the Bridge Company that I represented no interest as to particular point in the river at which the line should be established, its interest being in having the line established so that there could be no excuse for either state or local authorities taxing beyond the line so to be fixed.

Deponent further states that Mr. Green, of the late firm of Goudy Green & Goudy, appeared before Judge Gresham, at Chicago, on an application by S. Taber Bayles for an injunction against John W. Bertschi, to enjoin the collection of certain taxes on on said bridge for 1890. Which suit was dismissed and a bill filed in the Hancock Circuit Court in the name of said Bridge Company, against said Bertschi, collector of the County of Hancock, et al. to enjoin said tax of 1890, and on application to Judge Marsh for injunction, said Green appeared, and upon the allowance of said injunction, said Green prayed, an ap-

peal which was perfected, and on the argument in the Appellate Court an argument was filed in the name of Goudy, Green & Goudy, and deponent is of the opinion said Green argued orally, but is not positive. That while the appearance of said Green in said cause was ostensibly for the said Bertschi, collector, deponent is informed by parties at Hamilton, that the City of Hamilton paid the fees and expenses and services in said cause.

Deponent further states that while in the office of Attorney General in March, 1893, performing duties for him, deponent prepared and signed many papers and letters in the name of M. T. Moloney, Attorney General, but in all cases he added the name of T. J. Schofield, Assistant, as he was instructed to do. That deponent believes every paper signed so by him was copied in the letter press book by the proper person in the office.

G. EDMUNDS.

Subscribed and sworn to, before me, November 22d, 1893.

JOHN D. MILLER,
County Judge, Hancock County, Ill.

That subsequently on the 26 day of November, 1893, said George Edmunds requested a return of said affidavit above referred to, stating in said request that if same was returned he would forward an affidavit slightly modified; that thereupon a letter press impression was made by affiant of said original affidavit of date November 22nd, 1893, and the original of same was returned to said George Edmunds and said George Edmunds subsequent to the return of said original affidavit above referred to forwarded

for use in this cause the affidavit of date November 27th, 1893, which is filed in this cause. Affiant states that he is familiar with the handwriting of said George Edmunds; that the letter press copy hereinabove referred to, which is attached hereto marked exhibit "A" and made a part hereof, is in the hand writing of said George Edmunds, and signed by him; that the original of said affidavit cannot be produced for the reason that said George Edmunds has declined to redeliver same for use in this cause. Affiant produces the copy above referred to upon advice of counsel of the state of Iowa in order that this court may be advised as fully as may be of all facts and circumstances connected with said telegram. Affiant further states that on or about the 23rd day of March, 1893, the commissioners heretofore appointed in this cause marked the boundary line between the state of Iowa and the state of Illinois upon the Keokuk and Hamilton bridge, and affiant was informed that the report of the commissioners had been forwarded to Washington. That thereupon, upon the 24th day of March, 1893, affiant wrote to George Edmunds a letter addressed to Springfield, Illinois, informing said George Edmunds of the fact that the report of the commissioners had gone forward and requesting said George Edmunds to have the Attorney General of Illinois authorize counsel to appear for the state of Illinois upon motion to be made by the state of Iowa asking for confirmation of the said report. That subsequent to the writing of said letter, on or about the 25th day of March, 1893, I forwarded a telegram addressed to the Hon. T. J. Schofield, notifying the Attorney General of the state of Illinois that Mr. Walter I. Hayes would present a motion for confirmation of said report on behalf of the state of Iowa; that I

kept no copy of the telegram above referred to and therefore am unable to produce a copy of same; that at the time of the sending of said letter and telegram above referred to I had no knowledge or information that Mr. George Edmunds was acting as Attorney General of the state of Illinois, or that said George Edmunds was in any way connected with the said office of the Attorney General of the state of Illinois; that my reasons for addressing George Edmunds at Springfield, Illinois, was because I had telephoned to Carthage, Illinois, to ascertain the whereabouts of said George Edmunds, and was informed by telephone that he was thenat Springfield, Illinois; that I know the location of the line between the state of Iowa and the state of Illinois as same is marked on the Keokuk and Hamiltom bridge by the commissioners, and same is not in the middle of the Mississippi river as measured from bank to bank, but said line is about ninety feet west of the middle of said river.

J. H. COLE.

Subscribed and sworn to before me this 5th day of December, 1893.

[SEAL.] WILLIAM J. SCHLOTTER,
Notary Pdblic.

IN THE SUPREME COURT OF THE UNITED STATES.

THE STATE OF IOWA,
vs.
THE STATE OF ILLINOIS. } Original.

State of Illinois,
Hancock County. } ss.

George Edmunds, being duly sworn, says that at

the request of the Attorney General of Illinois, deponent endeavored to perform the duties of the office of Attorney General of Illinois, to the best of his ability, and in the performance of that duty deponent spent most of his time between the 20th and the 30th day of March, 1893. That by reason of the absence of Attorney General Moloney and the sickness of his assistant, the business of the office was largely behind. That during the time deponent was in said office in that capacity, Mr. Moloney was absent on business of the office most of the time, and his assistant was kept from the office all the time by sickness. That during that time deponent believes he put in an average of ten hours per day while there, answering correspondence and giving opinions, in the name and as the act of the Attorney General. That the job was not one of his own seeking. That in all of his acts as acting Attorney General deponent endeavored to perform the duties as he believed Mr. Moloney would have done if there. Deponent has no means of knowing the amount of correspondence answered or the number of opinions given, but believes it would extend into the hundreds. Every letter and every opinion, deponent believes, was copied in the office, though he did not make the copies. That deponent took no action in the name of the Attorney General that he did not then feel fully authorized to do, though in the mass of work done he may have made mistakes. That deponent did not while connected with said Attorney General office, do any act as attorney of the Keokuk and Hamilton Bridge Company or in its interest. As will be seen by a former affidavit made by me in this cause, this suit was instituted at my suggestion. (At its inception I regarded this suit an

amicable one, to ascertain and mark the boundary between the two states, not to fix any particular line but the true line, the sole interest of the Keokuk and Hamilton Bridge Company being to have the line fixed and known so as to prevent double taxation. In that view and that alone I suggested the pleadings in this cause, fully presenting the case and leaving to the court and commissioners to be appointed to designate the line, it being a matter of indifference to the company I represented at what point the line was fixed.)

G. EDMUNDS.

Subscribed and sworn to before me November 27th, 1893.

JOHN D. MILLER,
County Judge.

15 MD242

151-265-24

IN THE

Supreme Court of the United States.

TERM 1893.

In re JOHN BONNER *v.* P. W. MADDEN, WARDEN.	*Habeas Corpus.*

PETITION.

To the Supreme Court of the United States:

Your petitioner, John Bonner, respectfully states that he is now and ever since the 23d day of May, 1893, hath been unlawfully deprived of his liberty by P. W. Madden, as warden of the State penitentiary of the State of Iowa, situated at the city of Anamosa, Iowa. Your petitioner states that on the seventh day of October, 1892, in the United States court for the third judicial division for the Indian Territory, he was, upon the presentment of the grand jury of said court, indicted, charged with the crime of larceny of two (four) head of cattle. On the eighth day of May, 1893, after arraignment and plea of "not guilty" upon trial, before a jury in said court, this petitioner was found guilty of the charge contained in said indictment. A duly certified copy of said indictment is, with the ver-

dict of the jury, annexed as a part of this petition, marked Exhibit "A." On the ninth day of May, 1893, the Hon. Charles B. Stuart, as judge of said court, rendered judgment on said verdict, sentencing this petitioner to imprisonment in the said penitentiary at the city of Anamosa, Iowa, for the period of one year, and to the payment of a fine of one thousand dollars to the Government of the United States. As a part of said sentence and judgment the court further ordered the marshal of said court to convey the body of this petitioner and deliver him to the said warden of said penitentiary, and that the petitioner be there kept in confinement for the period of one year, in execution of said sentence. Petitioner says it is by virtue of said judgment and order of commitment that petitioner is now restrained of his liberty, and the said Madden hath no other authority to restrain this petitioner of his liberty. A certified copy of said sentence is hereto annexed and made a part of this petition, marked Exhibit "B." Now your petitioner says said sentence and order of commitment are void in this: That the said court was without power or jurisdiction under the law to render said judgment. Your petitioner states that on the eighth day of July, 1893, he made application to the Hon. Oliver P. Shiras, United States judge for the northern district of Iowa, for a writ of *habeas corpus*, to be released from confinement under said judgment, but upon the fifteenth day of August petitioner was by said judge remanded to the keeper of said peitentiary, and a writ of *habeas corpus* denied.

Your petitioner therefore prays that this Court issue him the gracious writ of *habeas corpus*, directing the said P. W. Madden to appear before this Court and show what authority, if any, he have for restraining this petitioner of his liberty, and that upon final hearing he be discharged.

JOHN BONNER.

Subscribed and sworn to before me by John Bonner this the 16th day of October, A. D. 1893.

[SEAL.] F. O. ELLISON,
Notary Public in and for Jones County, Iowa.

EXHIBIT A.

IN THE UNITED STATES COURT FOR THE THIRD JUDICIAL DIVISION OF THE INDIAN TERRITORY.

UNITED STATES
v.
JOHN BONNER, Defendant. } Indictment for Larceny.

UNITED STATES OF AMERICA,
Indian Territory, } *ss:*

At the October term of the court of the United States of America within and for the third judicial division of the Indian Territory, A. D. 1892, the grand jurors of the United States of America, chosen, selected, and sworn, within and for the third judicial division of the Indian Territory, in the name and by the authority of the United States of America, upon their oaths do find and present that one John Bonner, who is a citizen of the United States, late of the Territory aforesaid, heretofore, to wit, on or about the fifteenth day of May, A. D. 1892, and in the Chickasaw Nation, third judicial division, within the said Indian Territory, the same being in the Indian country, and was then and there virtually a place under the sole and exclusive jurisdiction of the United States, feloniously and unlawfully, and without the consent of the owner thereof, did then and there take and carry away, with intent to steal and purloin the same, four steers of the bovine species, branded 1 on the left shoulder, of the value of fifty dollars ($50.00), of the property of one

Robert Williams, who is not a member or citizen of any Indian tribe or nation, with the fraudulent intent to convert the same to his own use and benefit, and to deprive the owner of the value thereof,—

Contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

J. S. JENKINS,
Asst. U. S. Attorney.

Endorsed:

"Witnesses for the United States: Robert William, Bill William, Arthur James, Robert Curtis.

"Z. T. WALROND,
"*U. S. Attorney.*

"In the U. S. court for the Indian Territory, third judicial division. Criminal action, No. 1125. United States *v.* John Bonner, indictment for larceny. A true bill. L. L. Stowe, foreman of the grand jury. Sec. 5356 R. S.

"Filed in open court Oct. 7, 1892.

"MARSHALL L. BRAGDEN,
"*Clerk.*

"*Verdict.*

"We, the jury, duly empaneled and sworn in the above-entitled action, do find from the law and the evidence the within-named defendant guilty as charged. W. C. Castleberry, Foreman.

"Filed in open court May 8, 1893.

"JOSEPH W. PHILLIPS,
"*Clerk.*"

* * * * * * *

UNITED STATES OF AMERICA, }
Indian Territory,
Third Judicial Division. }

I, Joseph W. Phillip, clerk of the United States court in the Indian Territory, hereby certify that the foregoing transcript is a true and perfect copy of a certain indictment now on file in my office at Ardmore, in the third judicial division aforesaid.

Witness my hand and official seal this October 12, 1893.

[SEAL.] JOS. W. PHILLIPS,
Clerk,
By JNO. A. McCLURE, *D. C.*

EXHIBIT B.

THE UNITED STATES OF AMERICA, }
United States Court, Indian Territory, } *ss:*
Third Judicial Division, }

At a stated term of the United States court in the Indian Territory, third judicial division, begun and had in the court rooms at Ardmore, in the Indian Territory, on the first Tuesday of May, being the 2d day of that month, in the year of our Lord one thousand eight hundred and ninety-three, and of the independence of the United States of America the one hundred and seventeenth.

Present: the Hon. Charles B. Stuart, judge of said court.

On the 8th day of May, 1893, among the proceedings had were the following, to wit:

UNITED STATES }
vs. } *No.* 1125.
JOHN BONNER. }

After hearing the evidence, charge of the court, and

argument of counsel, the jury retired with a sworn bailiff to consider their verdict. The jury returned into open court in charge of their sworn bailiff, and after being duly polled returned the following verdict:

We, the jury, duly empaneled and sworn in the above-entitled cause, do find from the law and the evidence the within-named defendant guilty as charged.

W. C. CASTLEBERRY,
Foreman.

* * * * * * * *

And on the 9th day of May, 1893, to wit, the 7th day of said term of said court—present and presiding, the Hon. Charles B. Stuart, judge—the following, among other, proceedings were had, to wit:

UNITED STATES
vs.
JOHN BONNER. } *No.* 1125.

After hearing argument of counsel, it is ordered that the motion for a new trial filed herein be, and the same is hereby, overruled; to which ruling of the court the defendant excepts, and it is ordered that the defendant be allowed twenty days to prepare a statement of facts.

UNITED STATES
vs.
JOHN A. BONNER. } *No.* 1125.

Sentence.
Sentence Book A, Page 233.

UNITED STATES
vs.
JOHN A. BONNER. } *No.* 1125.

On motion of Clifford L. Jackson, Esq., attorney for

the United States court in the Indian Territory, third judicial division, the said defendant, John A. Bonner, was brought to the bar of the court, in custody of the marshal for said Indian Territory, and it being demanded of him what he has to or can say why the sentence of the law upon verdict of guilty heretofore entered against him by the jury in this cause on the 8th day of May, A. D. 1893, shall not now be pronounced against him, he says he has nothing further or other to say than he has heretofore said, whereupon, the premises being seen and by the court well and sufficiently understood, it is considered by the court here that the said John A. Bonner, for his crime aforesaid, be imprisoned in the United States penitentiary situated in Anamosa, in the State of Iowa, for the term and period of one year and that he pay to the United States of America a fine of one thousand dollars, and that they have execution therefor. It is further considered that the marshal of this court, in whose custody the said John A. Bonner is now here committed, receive and safely keep and convey the body of the said John A. Bonner hence to said penitentiary without delay, and deliver him to the custody of the keeper of said penitentiary, who will receive and safely keep the said John A. Bonner in prison in execution of the sentence aforesaid, and in conformity with the same, for the full period of the time aforesaid. And it is further ordered that the clerk of this court furnish the marshal of this court with two duly certified copies of this judgment, sentence and order, one of which shall be delivered to the keeper of said prison, and the other returned by the marshal to this court, with a full and true account of the execution of the same.

THE UNITED STATES OF AMERICA,
United States Court, Indian Territory, } ss:
Third Judicial Division,

I, Joseph W. Phillips, clerk of the United States court, within and for the third judicial division and Territory aforesaid, do hereby certify that the foregoing transcript is truly taken and correctly copied from Court Journal 4, pages 5467–70 of said court, and from page 233 of volume "A," record of judgment and sentences in criminal in said court.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at Ardmore, this 12th day of October, A. D. 1893.

[SEAL.]

JOSEPH W. PHILLIP,
Clerk,
By JNO. A. McCLURE,
Deputy.

Presented by

CHANEY & RANNELLS,
Attorneys for Petitioner.

151 U.S. 242

NOV 27 1893
JAMES H. MCKENNEY

In the Supreme Court of the United States.

OCTOBER TERM, 1893.

NO. 8, ORIGINAL.

EX PARTE. IN THE MATTER OF JOHN BONNER, PETITIONER.

To the Chief Justice and associate justices of the Supreme Court of the United States:

In pursuance of the order entered herein on October 30, 1893, requiring me to show cause why a writ of habeas corpus should not be granted as prayed in the petition, I respectfully submit that I hold the prisoner as warden of State penitentiary of the State of Iowa, at Anamosa, in said State, by virtue of a warrant of commitment issued under the judgment and sentence of the United States court held in the Indian Territory for the third judicial division, of which a copy is annexed to the petition; and that at the time of the petitioner's said conviction and of said judgment and sentence there was no penitentiary or jail suitable for the confinement of convicts or available therefor in said Indian Territory, and said State penitentiary at Anamosa had been duly designated by the Attor-